EDITOR'S NOTE

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. 85-1259-CFX
atus: GRANTED

Title: Edward Lunn Tull, Petitioner
v.
United States

cketed:
nuary 24, 1986

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Nageotte, Richard R.

Counsel for respondent: Solicitor General

try	Date	Note	Proceedings and Orders
1	Jan 24 1986	G	Petition for writ of certiorari filed.
2	Jan 24 1986		Appendix of petitioner Edward L. Tull filed.
3	Feb 20 1986		Brief amicus curiae of Virginia Trial Lawyers Assn. filed.
5	Feb 28 1986		Order extending time to file response to petition until March 31, 1986.
6	Mar 27 1986		Order further extending time to file response to petition until April 30, 1986.
7	May 1 1986		Order further extending time to file response to petition until May 5, 1986.
8	May 5 1986		Brief of respondent United States in opposition filed.
9	May 6 1986		DISTRIBUTED. May 22, 1986
10	May 27 1986		Petition GRANTED. limited to Question 1 presented by the petition.
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2	Jun 18 1986		Order extending time to file brief of petitioner on the merits until August 11, 1986.
3	Aug 8 1986		Joint appendix filed.
4	Aug 8 1986		Brief of petitioner Edward L. Tull filed.
5	Aug 11 1986		Brief amicus curiae of Virginia Trial Lawyers Assn., et al. filed.
6	Aug 11 1986		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
7	Aug 11 1986		Brief amicus curiae of Washington Legal Foundation filed.
8	Aug 7 1986		Brief amicus curiae of Washington State Trial Lawyers Assn. filed.
10	Sep 5 1986		Order extending time to file brief of respondent on the merits until October 8, 1986.
11	Sep 17 1986		Record filed.
12	Sep 17 1986		Certified copy of original record and proceedings, 3 boxes, received.
13	Oct 8 1986		Brief of respondent United States filed.
14	Oct 22 1986		CIRCULATED.
15	Nov 14 1986		SET FOR ARGUMENT. Wednesday, January 21, 1987. (3rd case)
16	Jan 9 1987	X	Reply brief of petitioner Edward L. Tull filed.

85-1259

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the defendant in a Government-instituted civil action in a Federal District Court to recover substantial civil penalties (in this case in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

2. (a) Whether equitable estoppel runs against the Government.

(b) Whether equitable estoppel precludes the recovery of civil penalties by the Government under the Clean Water Act when a citizen requests a jurisdictional inspection by the agency charged with enforcement, is led to believe that the agency does not have jurisdiction and that a permit is not required, proceeds with his development of lots under constant surveillance by the agency, is never advised that his activities have come under the agency's jurisdiction or are otherwise unlawful notwithstanding regulations requiring the agency to so inform the citizen, and is then punished five years later after virtually all of the lots have been sold to others.

PARTIES

The defendant-appellant below was an individual, Edward Lunn Tull. The plaintiff-appellee was the United States.

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IN THE

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No.

EDWARD LUNN TULL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Edward Lunn Tull respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 182 and appears at Appendix ("App.") 1a. The opinion and judgment order of the District Court are unreported and appear at App. 30a and 64a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1985. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of six to five on October 30, 1985. App. 26a. On November 4, 1985, a revised Order denying the petition for rehearing and suggestion for rehearing *en banc* was entered, with four judges dissenting. App. 28a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at App. 75a.

STATEMENT OF THE CASE

Petitioner ("Tull") is engaged in the business of developing residential properties on the island of Chincoteague, Virginia. In July of 1976, Tull obtained advice from his engineer and his attorney to insure that the proposed work would not encroach into the Corps of Engineers' jurisdiction. Joint Appendix filed in the Court of Appeals ("JA") 941. As an additional precaution, he requested a determination from the Corps itself—"to see if they had any objection to any work on any of the property there—any of the filling of the property." JA 951-952. Pursuant to his request, a jurisdictional inspection of these properties was conducted by the Corps' Norfolk District Engineer and his staff, which included the Chief of the Construction Operations Division, the Chief of the Regulatory Functions Branch, the Chief of the Waterways Inspection Branch, an employee of the

[1] The two sets of votes on rehearing differed in that Judge Warriner, sitting on the original panel by designation, was not counted when the second Order was entered.

Permits Branch, an employee of the Enforcement Division, and two Corps counsel. JA 663-670. The Corps counsel, whose duties included jurisdictional determinations (JA 663), confirmed that the express purpose of the inspection was to view the work ongoing at the sites in order to determine whether the activity was within the Corps' jurisdiction (JA 672) and was being carried on without a necessary permit. JA 709.[2] After being advised by the District Engineer that fill could not be placed at two locations, Tull proceeded with his plans as to the remaining properties (JA 518), but did not fill the areas where he was instructed that a permit would be required. JA 503-504, 719, 807, 838-839, 960, 962, 1383.

After the inspection, the Corps continued to monitor Tull's ongoing filling and construction activities by aerial inspections and photographs. JA 1142-46. These photographs demonstrated the progress of the work, which included pushing fill material into the Fowling Gut drainage ditch (JA 1261, 1262, 1373, 1427, 1439-42), construction of utilities and roads (JA 1371-72), and, ultimately, the sale of the properties to third parties and the placement of trailers on the lots. JA 1265-67, 1446. These improvements were made at substantial expense to Tull. JA 1382.

At no time during the five years between the inspection and the filing of the Complaint in this case did the District Engineer issue a cease and desist order or any other notification that Tull's filling activity was unau-

[2] The District Court conceded that the purpose of the inspection of "defendant's properties" was "to determine the 'Corps' jurisdiction' as to any filling activity to be conducted thereon." App. 37a.

At the time of this inspection, among the properties being filled was a drainage ditch later described in the District Court opinion as Fowling Gut Extended, for which there was no recorded easement. JA 1171-73, 1450. The Corps personnel had confirmed from prior aerial photographs that this ditch was being filled by Tull. JA 484-490, 1132-39.

thorized (JA 961-962), even though such notice is required by the Corps' regulations. 33 C.F.R. 209.120(g)(12) (1975) (App. 80a) and 33 C.F.R. 362.2 (1977) (App. 81a).[3] The first notice received by Tull was in the form of findings of violation and Orders for Compliance issued by the Environmental Protection Agency in December 1980 and January 1981, and these findings and Orders related to only a small segment of the property being filled.[4] JA 1242, 1247. Tull immediately stopped filling these properties (except for some oyster shells placed at the front face of the existing fill to ensure its stability), and he also sought clarification of the findings and Orders. JA 963-965, 1252, 1253-54.

This case began with the filing of a three-count complaint on July 1, 1981. The complaint alleged that Tull had filled wetlands adjacent to navigable waters, as defined by 33 C.F.R. 323.2(c), and that these wetlands were waters of the United States under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*[5]

Tull demanded a jury trial under the Seventh Amendment (JA 15), which was denied. JA 17.[6] Trial on the

[3] One letter from the Corps which Tull received in 1976 related to an operation that was never carried out. JA 710-712, 729-730. Another received in 1978 was merely a request to come onto certain property; because of a misunderstanding over which property the Corps was referring to, the matter was dropped after Tull's response. JA 976-982, 1862-64.

[4] Of the total penalty or fine of $325,000 ultimately imposed by the District Court, only $5,000 related to the properties alluded to in these findings and Orders.

[5] After the Complaint was filed, Tull was enjoined from further filling a property which was not the subject of the original Complaint. Tull immediately ceased filling this property. JA 985-986.

[6] The only reason that Federal Rule of Civil Procedure 38, which also guarantees the right to jury trial, was not pressed on the courts below is that, as the treatises make clear, the Rule is coextensive with the Seventh Amendment, neither adding nor detracting from the rights accorded by the Amendment. *See* J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶ 38.07[1] (2d ed. 1985); C. Wright & A. Miller, Federal Practice and Procedure, § 2301 (1971 & Supp. 1985).

merits began in July 1982, with the court sitting without a jury. JA 17-18. After the Government rested and Tull sought a partial directed verdict, the Government moved to reopen and amend, which Motion the court granted (JA 579), and the Government's Second Amended Complaint was filed. JA 28-35. The Second Amended Complaint included an alleged violation of 33 U.S.C. § 403. App. 67a-74a.

The Judgment Order entered by the District Court ordered Tull to pay a "penalty or civil fine" under Section 1319(d) of the Clean Water Act in the total amount of $325,000.00. App. 64a-65a.[7] The District Court offered Tull the option of obtaining a suspension of $250,000 of the fine by restoring the drainage ditch to its original condition. App. 65a. The District Court refused to permit Tull to relocate the drainage ditch to an alternative location upon his Petition that restoration to its original condition was impossible because he had sold the land to third parties. JA 126-132. Additionally, the District Court ordered restoration of a portion of the land by removal of fill material. App. 65a.

Tull appealed. The Court of Appeals, in a two-to-one decision, affirmed, finding no merit to Tull's claim that he had a right to a jury trial. The court held that the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted. App. 8a. The majority also rejected Tull's claim of equitable estoppel, holding that the District Court was not clearly erroneous in

[7] The District Court called $75,000 of this amount a "penalty or civil fine" and the remaining $250,000 a "fine," but since both penalties were imposed pursuant to the same section of the Clean Water Act, there was no legal distinction between them. *See* App. 59a.

finding that nothing the Government did or failed to do misled Tull. App. 10a.

Judge Warriner, dissenting, found error in the District Court's denial of Tull's demand for a jury trial. App. 19a-25a. He further found not only that Tull had relied upon the Corps of Engineers to his detriment, thereby invoking the doctrine of equitable estoppel (App. 13a-19a), but that the action of the Government representatives in this case "gives the appearance of lying in wait with a calculating eye for five years after first lulling him [Tull] into a reasonable view that his activities were acceptable; and after he invested time, money, and effort in completing what he thought to be suitable residential lots, the Corps with a bulging portfolio of evidence descended on him." App. 19a. Judge Warriner concluded that "the case at bar fits all the elements of equitable estoppel." App. 16a.

REASONS FOR GRANTING THE WRIT

The judges below were badly split in regard to the two questions presented in this Petition, with one judge dissenting on the panel and four judges in the Circuit voting to hear reargument *en banc*. This Court should grant certiorari to resolve these issues, one of which has caused a conflict in the Circuits and the other of which has been left unresolved by this Court's prior decisions.

1. Petitioner was entitled to a jury trial.

In this case the Government, pursuant to the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, sought civil penalties that could have exceeded $22 million.[8] Defendant Tull requested, but was denied, a jury trial. The trial court, sitting without a jury, imposed penalties of

[8] When the number of days alleged in the original Complaint to be possible days of violation is multiplied by the maximum civil penalty of $10,000 per day, the result is a possible total civil penalty of $22,890,000.

$325,000. App. 64a-65a.[9] As urged at each appropriate stage of this proceeding, the refusal to grant a jury trial violated Tull's Seventh Amendment rights.

In two cases during the early 1900s, this Court declared that in civil suits brought by the United States to recover penalties under the Alien Immigration Act, the defendants were entitled to jury trials. *Hepner* v. *United States*, 213 U.S. 103, 115 (1909); *United States* v. *Regan*, 232 U.S. 37, 47 (914).[10]

Confusion was introduced in 1937, however, when the Court discussed an NLRB order for both reinstatement and the payment of wages for time lost by a discharge. The Court stated that the Seventh Amendment preserved "the right which existed under the common law when the Amendment was adopted" but had "no application to cases where recovery of money damages is an incident to equitable relief * * *." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). As discussed *infra*, this language—to the extent that it implied that *only* those rights to a jury trial which existed at common law were entitled to Seventh Amendment protection—was later repudiated, but it nonetheless apparently confused the panel below. *See* App. 8a.

[9] Both the majority and dissent discussed the civil penalty imposed as $75,000, apparently because they believed that Tull could restore the Fowling Gut ditch to its prior condition and thus avoid $250,000 of the fine. Tull cannot restore the ditch, as it would require him to dig across property he had already sold to others prior to any Government action in this case. JA 126-132.

[10] The majority below declined to follow these decisions on the ground that the statements in them constituted merely *dicta*. App. 9a.

At about the same time that these two cases were decided, the Court held that the Seventh Amendment was not violated by transferring from the courts to a rental control commission actions to recover possession of real property. *Block* v. *Hirsh*, 256 U.S. 135, 158 (1921).

Almost ten years after *Jones & Laughlin Steel Corp.*, the Court decided a case that is relevant here even though it did not specifically discuss jury trials. *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), held that a court in equity had the power to order restitution of rents collected by a landlord in excess of the permissible maximum under Section 205(a) of the Emergency Price Control Act of 1942. The Court was careful to distinguish this restitution remedy from one for damages in the nature of penalties under Section 205(e) of the Act.[11] Such penalty actions, said the Court, would have to be brought in a court of law rather than in a court of equity. 328 U.S. at 401-402.

The restitution provisions applicable in the instant case, with their own penalty provisions (criminal), appear in the Rivers and Harbors Act, 33 U.S.C. § 406. These were *not* the penalties sought by the Government in this case. The $325,000 which Tull was ordered to pay was imposed not as restitution but as a civil penalty or fine under the Clean Water Act, 33 U.S.C. § 1319(d), similar to the Emergency Price Control Act dealt with in *Warner Holding Co.*

The Court squarely held in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), that the defendant was entitled to a jury trial, even though the original suit was brought solely for a declaratory judgment. In anticipation of a complaint seeking antitrust treble dam-

[11] As the Court explained: "Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e). * * * When the Administrator seeks restitution under § 205(a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." 328 U.S. at 402.

ages, the prospective defendant brought suit and the prospective plaintiff counterclaimed, raising the same issues that would have been raised in the prospective plaintiff's original suit. The Court held that the prospective plaintiff could not be deprived of a jury trial simply because equitable relief had originally been sought by the prospective defendant. Similarly, in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), the Court held that in a breach of contract suit where the plaintiff sued for both an injunction and an accounting, the claim was one for a money judgment, was legal in nature, and therefore required a jury trial.[12] And in *Ross* v. *Bernhard*, 396 U.S. 531, 537-538 (1970), the Court held in a stockholders' derivative action that where equitable and legal claims are joined in the same action, the right to a jury trial on the legal claims cannot be infringed by trying the legal issues as incidental to the equitable ones.

It was in this context that *Curtis* v. *Loether*, 415 U.S. 189 (1974), was decided. The Court there held that either party was entitled by the Seventh Amendment to a jury trial in a suit for damages under the Civil Rights Act of 1968. The Court interpreted the language of *Jones & Laughlin Steel Corp.*, quoted above, to mean merely that the Seventh Amendment "is generally inapplicable in administrative proceedings" (*id.* at 194), but that "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts," a jury trial must be available. *Id.* at 195. Even though the Civil Rights Act defined a new legal duty, the awarding of damages sounded basically in tort. *Id.* The Court went on to distinguish the *Warner Holding Co.* situation regarding reinstatement and backpay—although

[12] The Court held in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 333-337 (1979), that an equitable determination by a court can have collateral estoppel effect in a subsequent legal action without violating the Seventh Amendment. *See also Katchen* v. *Landy*, 382 U.S. 323, 339 (1966).

it refused to decide whether a jury trial would there be required. *Id.* at 196-197. It pointed out that there are substantial differences between restitution, involving a court's equitable jurisdiction, and damages. *Id.*[13]

In *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974), the Court held that the Seventh Amendment entitled either party to a trial by jury in a suit to recover the possession of real property, particularly since a similar right was protected at common law. But whether or not the statutory right established by Congress was a close equivalent of the common law right, the Seventh Amendment was applicable because "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." *Id.* at 375. The Court interpreted *Block* v. *Hirsh*, *supra* n.10, merely to mean that the Amendment "is generally inapplicable in administrative proceedings." *Id.* at 383.

Finally, in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), the Court dealt with a statutory scheme whereby Congress gave to an administrative agency the right to impose civil penalties on an employer maintaining any unsafe working condition. The Court held that where the Government sues in its sovereign capacity to enforce "public rights" created by federal statutes, the Seventh Amendment does not "prohibit Congress from assigning the *fact-finding function* and *initial adjudication* to an administrative forum with which the jury would be incompati-

[13] Following *Loether*, the lower courts have recognized that "the Seventh Amendment clearly requires trial by jury even in actions unheard of at common law where they involve rights and remedies of the nature of those traditionally involved in an action at law (rather than in an action at equity or in admiralty)." *United States* v. *Dudley*, 739 F.2d 175, 178 (4th Cir. 1984). *See also Quinn* v. *Digiulian*, 739 F.2d 637, 645-647 (D.C. Cir. 1984), and cases there cited.

ble."[14] The Court stressed the importance of the *forum* where the factfinding takes place (*id.* at 458-61), and it again interpreted *Jones & Laughlin Steel Corp.* to mean that the Seventh Amendment is generally inapplicable to administrative proceedings. *Id.* at 454-455.[15]

Following *Atlas Roofing Co.*, the Courts of Appeals have denied jury trials in actions involving claims historically considered equitable in nature,[16] where Congress has assigned decision-making to private arbitration proceedings,[17] where the sole question relates to the enforcement of a decree in a class action,[18] and where an ad-

[14] *Id.* at 450 (footnote deleted; emphasis added). The Court declined to decide, and apparently reserved, the question necessarily presented in the instant case of whether the Seventh Amendment has no application to *all* Government litigation involving fines. *Id.* at 449 n.6. The Court further refined the "'public' right" concept, but without relation to jury trials, in *Thomas* v. *Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3337 (1985). *See also id.* at 3341-42 (Brennan, J., concurring).

[15] Because of the doctrine of sovereign immunity, the Court has also held that a jury trial is not required in suits against the United States. *Lehman* v. *Nakshian*, 453 U.S. 156 (1981); *Galloway* v. *United States*, 319 U.S. 372, 388-389 (1943).

[16] *Phillips* v. *Kaplus*, 764 F.2d 807, 813-814 (11th Cir. 1985) (accounting of a partnership); *see also Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1001-08 (S.D.N.Y. 1980).

[17] *E.g.*, *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1124, 1131-32 (1st Cir. 1984) (Multiemployer Pension Plan Amendments Act); *Board of Trustees* v. *Thompson Building Materials, Inc.*, 749 F.2d 1396, 1404-06 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2116 (1985) (same); *Terson Co.* v. *Bakery Drivers & Salesmen Local 194*, 739 F.2d 118, 121 (3d Cir. 1984) (same); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 854-855 (2d Cir.), *cert. denied*, 104 S.Ct. § 3554 (1984) (same).

[18] *In re Corrugated Container Antitrust Litigation*, 752 F.2d 137, 143-145 (5th Cir.), *cert. denied*, 105 S.Ct. 3536 (1985).

ministrative agency itself determines reparations claims.[19] None of these cases, of course, even remotely governs this one.

More to the point, the defendant in a penalty suit brought by the Federal Aviation Administration under the Federal Aviation Act, 49 U.S.C. § 4171(a)(1), which subjects any one who violates the Act to a civil fine not to exceed $1000 for each violation, has been accorded a jury trial even though the Act does not provide for one. *See FAA* v. *Landy*, 705 F.2d 624, 627, 635 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983). The Tenth Circuit has refused to deny a jury trial in a suit by the United States for declaratory and injunctive relief and for the recovery of taxes. *United States* v. *New Mexico*, 642 F.2d 397, 402 (10th Cir. 1981). And alleged violations of the Bill of Rights of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 411, 529, have been held to be triable before a jury even though the claims were primarily equitable in nature. *Quinn* v. *DiGuilian*, 739 F.2d at 645-646.

However, the case that most closely resembles the instant one is *United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), and the decision below is squarely in conflict with Judge Friendly's careful and thorough analysis and decision for the Second Circuit in that case. There, the Federal Trade Commission asked the Attorney General to seek penalties against a company, pursuant to 15 U.S.C. § 45(1), for violation of a cease and desist order. In a lengthy opinion that dealt with all relevant cases, Judge Friendly concluded that the company was entitled to a jury trial.

He rejected the notion that the action was comparable to one seeking an order for civil contempt, which con-

[19] *Myron* v. *Hauser*, 673 F.2d 994, 1001-05 (8th Cir. 1982); *Rosenthal & Co.* v. *Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978). However, the courts have refused to by-pass jury trials where the action was for a statutory forfeiture. *E.g., United States* v. *One 1976 Mercedes Benz 280S*, 618 F.2d 453, 458-469 (7th Cir. 1980).

cededly did not entitle the defendant to a jury trial. 498 F.2d at 424-425. He pointed out that while Congress *could* have granted the Commission itself the power to impose penalties, subject to limited judicial review, it had not done so. *Id.* at 430. Pointing to numerous lower court decisions, he stated that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the discretion of the court * * *." *Id.* at 423 (footnote deleted). He concluded: "if in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later." *Id.* at 424-425. Like the statute at issue in *J.B. Williams Co.*, the Clean Water Act contains not a word of legislative history indicating that Congress intended for proceedings under the Act to be governed solely by equitable, as opposed to common law, principles, or for a jury trial to be denied. *Cf. Curtis* v. *Loether*, 415 U.S. at 192. And where the statute is silent, the result is clear.

Professor Moore agrees with the reasoning of Judge Friendly. He flatly states that "there is a right of jury trial when the United States sues to collect taxes or to collect a penalty, even though the statute is silent on the right of jury trial." J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 38.31[1] at 38-235-38-236 (2d ed. 1985). *See also* C. Wright & A. Miller, *Federal Practice and Procedure*, § 2316 at 79 (1971 & Supp. 1985).

We recognize, of course, that this Court has retreated from the early formulation that the Seventh Amendment was meant to embrace "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar

form which they may assume to settle legal rights." *Parsons* v. *Bedford*, 28 U.S. 433, 447 (1830). The Court has ruled that where Congress *both* creates the right to sue *and* establishes an administrative forum for the determination of that right, the Seventh Amendment does not apply because "the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." *Atlas Roofing Co.*, 430 U.S. at 460-461. However, the Court has never held that where Congress creates the legal right but allows the remedy to be determined in an ordinary court of law, a jury trial can be denied. *Curtis* v. *Loether*, in fact, held to the contrary.

The Second Amended Complaint in this case, which appears at App. 67a-74a, leaves no doubt as to the nature of the action brought by the Government and the forum in which it was to be adjudicated. The Complaint was lodged in Federal District Court and alleged that "[t]his is a civil action" instituted to obtain injunctive relief and "the imposition of civil penalties." App. 67a. It charged that Section 309(d) of the Clean Water Act provides for "a civil penalty not to exceed $10,000 per day" for any one who violates the Act (App. 68a); it thereafter cited this Section three times as the source of the relief sought (paras. 12, 18, 24, App. 69a-71a); and it in fact asked the District Court to "assess[] civil penalties in the amount of $10,000 per day for each violation * * *." App. 72a. The Complaint also sought an injunction and an order directing Tull "to restore" the wetland areas (App. 72a), even though at the time of the Complaint he no longer owned almost all of the property. The Complaint was issued by the United States Attorney, an Assistant United States Attorney, and an attorney for the Land and Natural Resources Division of the Department of Justice. App. 72a-73a.

To say that this Complaint initiated an action in District Court that was equitable in nature would be a gross

perversion of the facts.[20] The penalties were not an adjunct of, or incidental to, equitable relief;[21] the so-called equitable relief was a catch-all remedy, almost wholly moot at the time of the action, which was incidental to the imposition of fines and penalties. If this action was sufficiently "equitable" to defeat a request for a jury, a jury trial can be thwarted in *any* action in any court for damages, fines, or penalties simply by the addition of a conclusory request for an injunction.

Moreover, regardless of whether the injunction was incidental to damages or vice versa, this is the wrong test. It is precisely the one rejected by this Court in *Dairy Queen*, where the District Court regarded the claim for a money judgment as "incidental" to the injunctive relief sought, and this Court held that under *Beacon Theatres*, entitlement to a jury trial "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." 369 U.S. at 473.

A suit for civil penalties is a legal action, in the nature of an action in debt, and not an equitable one.[22] And it is precisely this kind of legal action that entitles the defendant to a jury trial. Here, the District Court acknowledged that it was sitting in law as well as in equity. App. 59a.

Even the Court of Appeals did not try to characterize this as an equitable action with a penalty adjunct. In-

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[20] Historically, courts of equity had no power to impose civil penalties. Such penalties were not part of the "remedies, procedures and practices" evolving from the English Court of Chancery. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939).

[21] In fact, the injunctive relief provisions of the Clean Water Act, 33 U.S.C. § 1319(b), are in an entirely different subsection of the Act from the civil penalty provisions, 32 U.S.C. § 1319(d). *Cf. Warner Holding Co.*, 328 U.S. at 402.

[22] *E.g., United States* v. *Regan*, 232 U.S. at 46-47; *United States* v. *Stevenson*, 215 U.S. 190, 197-199 (1909); *Whitehead* v. *Shattuck*, 138 U.S. 146, 151 (1891).

stead, apparently recognizing that the penalties were what this case was all about, the court tried to explain its decision by saying that the Government was not suing here to "collect a penalty analogous to a remedy at law" but instead was "asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine." App. 9a. This is simply inexplicable. The determination of the amount of a penalty or fine is precisely what an action at law seeks. The action does not become equitable because the *amount* of the penalty must be determined by the factfinder. Here, the Government sought penalties of up to $10,000 a day, and the court imposed penalties totaling $325,000. To treat that determination of damages as "equitable" would turn virtually every lawsuit into one without a jury.

The implications of the decision below are thus enormous. We have found, and have listed in Appendix G (App. 82a-100a), some 225 federal statutory sections that grant the Government the right to seek civil penalties or fines in varying amounts but that do not repose in an administrative agency in the first instance the right to determine, impose and collect those penalties or fines. Of these statutory sections, approximately 195 have been enacted since October 18, 1972, when the Clean Water Act became law. This represents more than a seven-fold increase in federal statutes imposing civil penalties within the last 13 years. This dramatic increase demonstrates that the jury trial issue will be a constantly recurring one and that the decision below will affect proceedings and trials far beyond the confines of the Clean Water Act.

That the issue is likely to recur is illustrated by a case which was decided subsequent to the decision below and which also dealt with the Clean Water Act. In *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985), the District Court ordered the payment of $200,000 in damages to be used in restoration areas of

south Florida and a $20,000 fine after finding that the propellers of a construction company's tug boat stirred up bottom sediment which was then deposited on adjacent sea grass beds. This was held to constitute a "discharge of a pollutant" within the meaning of the Clean Water Act. The Eleventh Circuit, citing three of this Court's cases that were wholly off the mark,[23] as well as the decision in the instant case, concluded that both the Clean Water Act and the Rivers and Harbors Act were "equitable in nature," and therefore the defendant was not entitled to a jury trial. *Id.* at 1507. We have been advised by counsel for M.C.C. of Florida, Inc., that certiorari is being sought in that case.

We know that we need not argue to this Court the importance of the right to a jury, because the Court itself has emphasized that importance on a number of occasions.[24] We need only add here that to deny a jury in a case where a trial judge imposes $325,000 in fines and penalties on the ground that the action is "equitable" in nature is such a perversion of justice that this Court should not allow it to stand. Congress could have given

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[23] *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), held that it was proper under the Rivers and Harbors Act of 1899 to enjoin the respondent companies from depositing industrial solids in a river and that they could be ordered to restore the depth of the channel by removing portions of the existing deposits. *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967), involved two admiralty cases which permitted the Government to recover the cost of removing sunken vessels. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), held that the Navy could be enjoined from discharging ordinance into waters without a permit or Presidential exemption. None of these cases involved the imposition of civil penalties or the right to trial by jury. They went no further than to impose specific equitable relief provided for by the statutes involved.

[24] *E.g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. at 501; *Jacob* v. *City of New York*, 315 U.S. 752, 753 (1942); *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). *See also* Kirst, *Administrative Penalties and the Civil Jury: the Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1338-43 (1978).

to an administrative agency the power to impose penalties under the Clean Water Act.[25] It chose not to do so. The traditional right to jury trial, therefore, should remain intact.

2. Equitable estoppel runs against the Government and should be applied in this case.

This Court has held that the particular facts in each of a series of cases did not rise to the level necessary to work an estoppel against the Government.[26] However, the Court has left open the question of whether estoppel can run against the Government in a proper case.[27] Justice Rehnquist most recently in *Heckler* v. *Community Health Services*, 104 S.Ct. at 2228, made it clear that the majority's decision did not foreclose equitable estoppel against the Government in an appropriate case.

The Court in *Heckler* noted a number of instances in which it was held that the Government, after acting in "misleading ways," could not then enforce the law in a

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[25] See, Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 Colum. L. Rev. 1591, 1599 (1984).

[26] *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982); *Heckler* v. *Community Health Services*, 104 S. Ct. 2218 (1984).

[27] "Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government." *Heckler*, 104 S. Ct. at 2224 (footnotes deleted; emphasis in the original).

harmful manner. *Id.* at 2225 nn. 12 and 13.[28] We submit that the instant case is one where, in the Government's dealings with Tull, there was not even the "minimum standard of decency, honor and reliability," referred to in *Heckler*. *See supra* n. 24. Judge Warriner's dissent sets out in detail why, under the facts of this case, equitable estoppel should be invoked. App. 13a-19a. We would simply add that what happened to Tull in this case is not fair, and in the final analysis the doctrine of equitable estoppel is a doctrine of fairness—one which must be used to ensure that justice is done.

Unfortunately, those cases in which this Court has previously dealt with the issue of equitable estoppel against the Government have been factually flawed. In *Montana* v. *Kennedy*, there was a failure to issue a passport in 1906 at a time when a passport was not required for the citizen to return to the United States. In *INS* v. *Hibi*, the failure was to publicize rights or to station an authorized naturalization representative in the Philippines. *Schweiker* v. *Hansen* involved reliance upon a claims manual which was not a regulation and therefore had no legal force to bind the Government; in fact, application of the doctrine of equitable estoppel would itself have brought about an unfair result. And in *Heckler*, equitable estoppel would have resulted in Community Health Services keeping money paid to it by mistake. The facts of the instant case are far more compelling than in any of these other situations.

The majority and the dissent in the court below saw this case in diametrically opposite ways; unfortunately, only the dissent saw the unfairness and injustice that resulted. The jurisdictional inspection requested by Tull in July of 1976 was made by the District Engineer and eight members of his staff, including two attorneys. The

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[28] Since *Heckler*, one Circuit has refused to allow dismissal of a case on the ground that the Government could not be estopped. *Reeves* v. *Guiffrida*, 756 F.2d 1141, 1144-45 (5th Cir. 1985).

majority below disregarded the fact that the precise purpose of this inspection was to make jurisdictional determinations and to determine whether permits were needed. App. 13a; JA 672, 709. The majority cited to Tull's failure to have available a development plan (App. 11a) but made no mention of the fact that at the time of the inspection Tull was in the process of filling the drainage ditch for which the District Court imposed $250,000 of the $325,000 in civil fines, so that irrespective of the existence of a development plan, the work was being done before the District Engineer's eyes. JA 568. Also ignored were compliance with the instructions received and the continued surveillance of his property for five years after the inspection. The finding that nothing the Government did or failed to do misled Tull wholly ignored the site visit, the continuing surveillance, and the correspondence between the parties. Finally, the majority did not even address the Corps' failure to issue the required Cease and Desist Order mandated by its own regulations, 33 C.F.R. § 209.120(g)(12) (1975) and 33 C.F.R. § 326.2 (1977)—a fact significant enough to be discussed by this Court in *Schweiker*, 450 U.S. at 789. The Court there pointed out that the Claims Manual relied on in that case was "not a regulation. It has no legal force, and it does not bind the SSA." *Id.* Here, however, we do have regulations. The failure of the District Engineer to issue a Cease and Desist Order mandated by his own regulations does have legal force and should bind the Corps.[29]

[29] The majority also disregarded the undisputed fact that at the time of the jurisdictional inspection by the District Engineer and his staff, Tull was filling the area immediately adjacent to Fowling Gut and the drainage ditch which emptied into Fowling Gut. Since he was not advised that this activity required a permit, it was certainly not unreasonable for him to believe that no permit was necessary when he was filling isolated low areas in the pine trees a great distance from Fowling Gut. The majority of the punishment imposed in this case, $250,000, was for filling the drainage ditch which the District Engineer observed being filled. The District Engineer did not advise Tull that a permit was required to fill that ditch, while at the same time advising him that a permit was required in another area.

We submit that the record clearly supports the dissent's view of this case, and even the majority's version raises the very issue it said it was not deciding. That is, it is clear from both versions that Tull, in good faith, *thought* he could proceed with the development of his property. JA 566. He certainly did not act in silence or in secret. It was precisely because of Tull's prior litigation with the Corps that he not only relied upon his attorney and his engineer, but he arranged the inspection to determine that his project was not within the Corps' jurisdiction and did not require a permit. JA 951-952. Regardless of how one views the Corps' inspection and what was or was not said, one thing is indisputably clear: Tull was filling the property, the filling was visible for all to see, and unless he was told otherwise, he planned to proceed. Nor is there any dispute about the Corps' general knowledge of the ongoing filling of the land, regardless of whether the Corps thereafter entered the property rather than observing it from the air. The Government experts at trial had no difficulty reviewing the same aerial photographs taken by the Corps over this period and testifying that wetlands had been filled in violation of the law. In spite of this overwhelming evidence, the majority chose to attribute no culpability to the Government. The dissent did, and the dissent was correct.[30]

We submit that this case is an appropriate one to decide the question previously left open of whether equitable estoppel runs against the Government. The Court should hold that because of the reprehensible conduct of the Government and the extent to which Tull, as Judge Warriner put it, was "lulled" into the activity for which he was then fined, the Government should have been equitably estopped from suing him.

[30] In this regard, the instant case is a far more egregious example of detrimental reliance and equitable estoppel against the Government than *Payne* v. *Block*, 751 F.2d 1191 (11th Cir. 1985), where certiorari has been granted. 54 U.S.L.W. 3223 (Oct. 2, 1985, No. 84-1948).

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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85-1259

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Robert G. Doumar, District Judge. (C/A 8-668-N)

Argued: February 7, 1985 Decided: July 30, 1985

Before WINTER, Chief Judge, SNEEDEN, Circuit Judge, and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Richard R. Nageotte (Nageotte, Borinsky & Zelnick on brief) for Appellant; Claire L. McGuire, Department of Justice (F. Henry Habicht II, Assistant Attorney Gen-

eral; Elsie L. Munsell, United States Attorney, John F. Kane, Assistant United States Attorney, Diane L. Donley, Martin W. Matzen, Department of Justice on brief) for Appellee.

WINTER, Chief Judge:

Defendant Tull, a real estate developer, placed fill on "wetlands" without a permit at several locations on the island of Chincoteague, Virginia. The government sued, alleging that this filling violated both the Clean Water Act,[1] 33 U.S.C. § 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* The district court found Tull had violated both Acts, fined him, and ordered various other remedies. Tull appeals, and we affirm.

I.

We begin our discussion by summarizing the statutory and factual background of this dispute. We then treat those of appellant's arguments that merit discussion.

Statutory Background

The Clean Water Act aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this purpose, the Act prohibits the discharge without a permit of dredged or fill material into "navigable waters" of the United States. 33 U.S.C. §§ 1311, 1344. The Act authorizes the Secretary of the Army to issue the permits required for such discharges. The Secretary has in turn delegated this authority to the Corps of Engineers. 33 C.F.R. § 325.8 (1984). The Corps evaluates permit applications under guidelines developed by the Environmental Protection Agency in conjunction with the Secretary of the Army. 33 U.S.C. § 1344(b).

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[1] Also known as the Federal Water Pollution Control Act.

The reach of the Clean Water Act extends beyond discharges into waters actually supporting navigation. "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). During the legislative proceedings culminating in the enactment of that section, the Conference Committee explained the legislative intent in defining this term:

> The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3776, 3822.

Included in the areas subject to Corps regulation under the Clean Water Act are "wetlands" adjacent to other "waters" of the United States. 33 C.F.R. § 323.2(a)(1)-(7) (1984). "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration suffiicent to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions." The administrative definition further provides that wetlands "generally include swamps, marshes, bogs and similar areas." 33 C.F.R § 323.2(c) (1984).

The Rivers and Harbors Act, which defendant Tull was also found to have violated, prohibits placing fill in navigable waters without the authorization of the Secretary of the Army. 33 U.S.C. § 403. This Act defined "navigable waters" at the time of Tull's alleged violation as waters that "have been used in the past, are now used, or are susceptible to use" for interstate commerce, and waters subject to the ebb and flow of the tide. 33 C.F.R. § 209.260(k)(2) (1975), superseded by 33 C.F.R. § 329.4 (1984) (similar definition).

Factual Background

The government sued Tull in July of 1981 for dumping fill at three locations in violation of the Clean Water Act:

(1) Ocean Breeze Mobile Homes Sites;

(2) Mire Pond Properties

(3) Eel Creek.

The government later amended its complaint to allege that by placing fill in Fowling Gut Extended, a manmade waterway on the Ocean Breeze property, Tull also violated the Rivers and Harbors Act.

The evidence at a 15-day bench trial showed that Tull began placing fill on the Ocean Breeze property in 1975, on the Mire Pond properties in 1978, and on the Eel Creek property sometime after December of 1980. Tull filled in Fowling Gut Extended, a body of water described as a canal or ditch, beginning in 1976. Tull never applied for a permit to place fill at any of these locations.

Tull did not deny that he had placed fill at the locations alleged, nor did he claim that he had ever applied for a permit. Rather, he argued that the properties filled did not contain wetlands within the meaning of the Clean Water Act, and that Fowling Gut Extended was not navigable within the meaning of the Rivers and Harbors Act. He further argued that the government was estopped from seeking equitable relief, and that the Clean Water Act as applied to him was unconstitutional.

On the issue of whether the filled properties contained wetlands, the government produced at trial extensive evidence, including 12 expert witnesses, to establish that the areas filled by Tull included "wetlands" within the jurisdiction of the Corps of Engineers. Buried soil analysis showed the presence of peat, which develops only in

wetlands system. Vegetation analysis showed the presence of "obligate" wetlands species, which require saturated soil conditions. Expert testimony established tidal influence and some degree of inundation.

Dr. Donna Ware, a court-appointed expert, agreed with the conclusions of the government witnesses, finding wetlands existed on the properties in question. Mr. Ronald Beebe, a civil engineer testifying for Tull, disagreed. His opinion that certain filled areas were not within Corps jurisdiction, however, was based not on the regulatory definition of wetlands, but on the fact that the developed sections lay above the high-water mark. The district court supplemented the extensive expert testimony by conducting a viewing of the filled areas.

The evidence on Fowling Gut Extended showed that the federal government had spent $30,000 in 1963 for construction of a drainage ditch to control mosquito breeding. One witness testified that boats could travel up this ditch or canal, at least for a short time, and that it was subject to the ebb and flow of the tide.

The district court concluded that there was "substantial, credible evidence" that Tull had filled areas "typically tidal, marsh or bog in character" on all the properties in question. It found that Fowling Gut Extended "was navigable in fact and was utilized by boat traffic subsequent to 1963 and prior to the time when [Tull] filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineers." Concluding that Tull had violated both Acts, the district court assessed fines of $75,000 for the filling at Ocean Breeze, Mire Pond, and Eel Creek, and ordered Tull to restore areas on all three properties to wetlands. For filling Fowling Gut Extended, Tull was ordered either to pay a $250,000 fine or to restore the canal "to its former navigable condition."

II.

Whether the Clean Water Act or its Application Here is Unconstitutional.[2]

A. *The Commerce Clause*

Tull argues that the regulation of his property under the Clean Water Act goes beyond the proper reach of the commerce clause. The Seventh Circuit rejected this argument in United States v. Byrd, 609 F.2d 1204, 1210 (7 Cir. 1979). It found that regulating wetlands was justified by the negative effect that destruction of wetlands could have on the "biological, chemical, and physical integrity of the [navigable] lakes they adjoin." *Id.* at 1210. The Supreme Court has cited this discussion in *Byrd* with approval, noting "we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution . . . ." Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 282 (1981). We follow these authorities and reject defendant's argument.

Tull concedes that there is precedent rejecting his commerce clause argument. He urges, however, that the government already litigated this issue against him and lost, in United States v. Tull, No. 75-319-N slip op. (E.D. Va. November 12, 1975). We disagree. Collateral estop-

[2] Tull made a fifth amendment taking argument in the district court. It, however, rejected the argument on ripeness grounds, and Tull has not reasserted this argument on appeal. A Sixth Circuit panel, we recognize, has narrowly construed the Clean Water Act's regulatory definition of wetlands to avoid what it sees as "a very real taking problem." United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 398 (6 Cir. 1984), *cert. granted*, 105 S. Ct. 1166, 84 L. Ed. 2d 318 (1985). Even *Riverside's* narrow construction, however, encompasses the swamp, marsh or bog adjacent to navigable waters at issue here. 729 F.2d at 398. *Riverside* would exclude only "inland low-lying areas" from Corps jurisdiction. *Id.* at 398, 401.

pel precludes the government from relitigating "the same issue already litigated against the same party in another case involving virtually identical facts." United States v. Stauffer Chemical Co., 104 S. Ct. 575, 578, 78 L. Ed. 388, 392 (1984). The earlier case against Tull, however, did not present a virtually identical situation, nor was the commerce clause issue squarely presented.

In the earlier case, Tull introduced fill without a permit into an area behind a bulkhead. The district court found that the area was "high and dry most of the time," and "would probably see a little flooding for only two or three hours per month." It lay above the mean high water line, and the district court found it "could not even be said to be 'periodically' flooded" within the meaning of the regulation then defining Corps jurisdiction. *See* 40 Fed. Reg. 31,320 (1975).[3] The district court then suggested in dictum that including land which is "high and dry, above the average high tide" line within federal regulation because it might be periodically inundated "is further than we choose to go." That decision left open the question whether areas that receive sufficient flooding or saturation to support plants adapted to "saturated soil conditions," and that therefore meet the current definition of "wetlands," 33 C.F.R. § 323.2(c) (1984), are constitutionally subject to federal jurisdiction.

B. *Vagueness*

Tull argues that the Clean Water Act regulations are unconstitutionally vague because the imprecise definition

[3] This regulation, now superseded, provided:

> Corps jurisdiction would extend to all coastal waters subject to the ebb and flow of the tide shoreward to their mean high water mark . . . and also to all wetlands, mudflats, swamps and similar areas which are continguous or adjacent to coastal waters. This would include wetlands periodically inundated by saline or brackish waters that are characterized by the presence of salt water vegetation capable of growth and reproduction . . . .

of "wetlands" makes it too difficult for landowners to determine their potential liability. We reject this argument, as have other courts. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 917 (5 Cir. 1983); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975). As applied to this case, the regulatory definition of wetlands is sufficiently definite to give a person of ordinary intelligence fair notice of what conduct the Clean Water Act prohibits or requires. *Cf.* United States v. Harriss, 347 U.S. 612, 617-18 (1954).

III.

Whether Tull Had a Right to a Jury Trial

We find no merit in Tull's claim that he had a right to a jury trial in this case. The seventh amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the amendment was adopted. Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). ". . . Congress may constitutionally enact a statutory remedy unknown at comomn law, vesting factfinding in an administrative agency or others without the need for a jury trial." Republic Industries v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628, 642 (4 Cir. 1983), *cert. denied*, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984).

Tull urges that he had a right to a jury trial because the government was seeking civil penalties under the Clean Water Act. To support this argument, he points to the Second Circuit's decision in United States v. J.B. Williams Co., Inc., 498 F.2d 414 (2 Cir. 1974). The court there found a seventh amendment "right of jury trial when the United States sues . . . to collect a [statutory] penalty, even though the statute is silent on the right of jury trial." *Id.* at 422-23 (quoting 5 Moore, Fed-

eral Practice ¶ 38.-31[1] at 232-33 (1971 ed.)). In so holding, the Second Circuit found guidance in several older Supreme Court cases. Thus in Hepner v. United States, 213 U.S. 103, 115 (1909), the Supreme Court suggested in dictum that "[t]he defendant was, of course, entitled to have a jury summoned" where the government sued to collect a $1,000 civil penalty for violation of the Alien Immigration Act. *See also* United States v. Regan, 232 U.S. 37 (1914) (dictum regarding penalty under Alien Immigration Act).

We reject defendant's argument. First, we note that the Supreme Court has left open the question whether the dictum of *Hepner* and *Regan* "correctly divines the intent of the Seventh Amendment," or whether the seventh amendment has no application to government litigation at all. *Atlas Roofing*, 430 U.S. at 449 n.6.

Second, even assuming that the seventh amendment applies to government litigation, the fact that the government is suing to collect statutory penalties does not require a jury trial. The Supreme Court has not gone "so far as to say that any award of monetary relief must necessarily be legal [as opposed to equitable] relief" for purposes of determining the right to a jury trial. Curtis v. Loether, 415 U.S. 189, 196 (1974). In *Regan* (as in *Hepner*), the monetary relief sought was a penalty of a set amount, and the Supreme Court analogized the suit to "a civil action of debt." *Regan*, 232 U.S. at 47. Here the penalties are within the district court's discretion; the government is not suing to collect a penalty analogous to a remedy at law, but is asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine.

Nor are the penalties simply equivalent to punitive damages in actions at law. Here the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of

remedies, one part of the package affecting assessment of the others.[4] This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence. In such circumstances, the seventh amendment is inapplicable. *See Jones & Laughlin*, 301 U.S. at 48-49, *quoted in Atlas Roofing*, 430 U.S. at 453 (seventh amendment inapplicable where "recovery of money damages is an incident to [nonlegal] relief even though damages might have been recovered in an action at law," since equity courts historically granted such monetary relief).

IV.

Whether the Government is Equitably Estopped from Suing Tull

Tull argues that the government is equitably estopped from obtaining relief because Corps personnel misled him into believing that his filling activities were lawful and did not require a permit. The district court emphatically rejected this argument, finding that nothing the government did or failed to do misled the defendant. We cannot say this finding was clearly erroneous, and with no showing that the government misled Tull the equitable estoppel argument certainly must fail. *See* Heckler v. Community Health Services of Crawford County, Inc., 104 S. Ct. 2218, 2223-24, 81 L. Ed. 2d 42, 51-52 (1984) (invoking equitable estoppel against government requires at least a showing that party reasonably relied on government's misleading conduct). We therefore need not reach the issue whether misleading by silence or inaction, the most Tull alleges here, could ever justify invoking the equitable estoppel doctrine against the government. *Cf. id.*, 104 S. Ct. at 2224, 81 L. Ed. 2d at 52 (whether

[4] Thus the fine for filling Fowling Gut Extended was offered as an alternative to the injunctive remedy of restoring that waterbody to its previous condition.

doctrine applicable to government at all an open question); United States v. Harvey, 661 F.2d 767, 773-74 (9 Cir. 1981), *cert. denied*, 459 U.S. 833 (1982) (invocation of doctrine against government requires affirmative misconduct).

Tull complains in particular about a Corps of Engineers' visit to the Ocean Breeze property in July of 1976. An engineer told him not to place fill in one part of his property; Tull claims this instruction led him to believe that filling without a permit anywhere else on his property would be proper. Yet several witnesses testified that the purpose of the Corps' visit was to determine whether *ongoing* work required filling permits. At the time of the visit, Tull did not discuss the future development of the property at issue here with the Corps engineers; indeed, he did not yet even have a development plan. Thus, there did not even exist plans that the engineers could have tacitly endorsed. Further, Tull's earlier disputes with the Corps over the filling of property meant he could not have been ignorant of the general requirement of obtaining a permit to fill wetlands.

Tull further complains that the government misled him by waiting several years before bringing this suit. The district court found that any such delay did not mislead Tull. The government sued Tull unsuccessfully in 1975, issued a cease and desist order against his filling Eel Creek in 1976, and also obtained an injunction against his filling at Mire Pond. Given such circumstances, we cannot overturn the district court's finding that Tull was in no way misled by the government's failure to bring even more lawsuits against him.[5]

[5] The dissent, in asserting that the government should be estopped, adopts Tull's argument that he followed the Corps' 1976 directions in placing fill on his property, while the Corps stood by and watched in silence until the government brought suit in 1981. The record establishes, however, that aerial photographs of new filling on Tull's property in the summer of 1978 revealed possible statutory

V.

Navigability of Fowling Gut Extended

Tull argues that he did not violate the Rivers and Harbors Act by placing fill in Fowling Gut Extended, since no credible evidence supported the district court's finding that the waterway was navigable. We disagree. The district court had before it the testimony of an oyster inspector who testified that Fowling Gut Extended was subject to the ebb and flow of the tide. The Corps' regulations in effect at the time Tull filled the waterway defined navigable waters to include those "subject to tidal action." 33 C.F.R. § 209.260(k)(2) (1975), superseded by 33 C.F.R. § 329.4 (1984) (includes waters "subject to the ebb and flow of the tide"). *See also* 33 C.F.R. § 320.8(a) (1984) ("canal or other artificial waterbody that is subject to the ebb and flow of the tide is also a navigable water of the United States"). The district court therefore did not err in finding Fowling Gut extended navigable.

We do not think that Tull's other contentions merit discussion.

AFFIRMED.

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violations. Corps personnel then asked for an on-site meeting "to determine if the shoreline work being done on Mr. Tull's property just south of Beebe Road could be in our regulatory jurisdiction." Tull's lawyer responded by letter that "no work is being done on the property owned by [Tull] adjoining Fowling Gut at Chincoteague Island," and that the Corps' request for an on-site meeting was therefore denied. A Corps scientist testified that at that time the Corps had information indicating that Tull had violated the law with respect to Ocean Breeze, but that it took no action because it lacked sufficient specific data on which to base a cease and desist order. Its effort to get further information by examining the property was thwarted. Given this evidence, Tull cannot argue meritoriously that he was the victim of innocent reliance, or that following the 1976 visit he had no further word from the Corps that they had any question about the propriety of his activities.

JUDGE WARRINER, dissenting:

Having had unhappy experiences with the United States Corps of Engineers respecting alleged encroachment by him on wetlands and navigable waters, appellant Tull hired a lawyer and a civil engineer to review proposed filling of lowlands owned by Tull near Chincoteague. With assurance from the lawyer and the engineer that his proposals would not cause damage to wetlands or navigable waters, he then called in representatives of the Corps of Engineers and took them on a tour of the sites explaining the nature of the work he proposed. During the tour he was advised by an appropriate official of the Corps that a certain proposal could not be accomplished without damage to wetlands. This oral directive was confirmed by letter within a few days. Tull strictly adhered to this direction and to another minor direction given by an official of the Corps on the scene. He proceeded with his other plans in accordance with the advice given him by his lawyer and his civil engineer.

During the next five years while the work was in progress the Corps of Engineers kept the site under surveillance both on the ground and by aerial observation and photographs. They observed over many months plaintiff engaging in the fill activity which he had pointed out to them on the ground on the day of their visit. After plaintiff had completed his work, with no further word from the Corps of Enginers that they had any question about the propriety of his activities, and after plaintiff had sold off lots in the filled area to third parties, the Corps of Engineers in the name of the United States filed this action against Tull seeking injunctive relief and civil penalties for conducting his activities without a permit.

Tull, not the Corps, was fined $75,000. Additionally, extensive and extremely expensive site restoration was required of him. Tull appeals urging that he was mis-

treated by the Corps of Engineers. He points to the equitable doctrine of estoppel.

The Supreme Court has consistently left open the possibility of estoppel against the government. Though the Supreme Court found in *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961), that inaccurate but "well-meant" advice given by a consular officer fell "far short of misconduct such as might prevent the United States" from carrying forward with legal action, the door to estoppel was left ajar.

The Court found that the sort of "affirmative misconduct" adverted to but not found in *Montana, supra*, also was not present in *INS v. Hibi*, 414 U.S. 5, 8 (1973). In that case the alleged misconduct of the government was in not aggressively publicizing immigration rights created by Act of Congress and in not stationing an authorized naturalization official in the Philippines during the statutory period following World War II. Still, the legal possibility of estoppel against the government was recognized. *Id.*

A government agent who failed to respond accurately to a citizen's verbal question in a fifteen minute interview was found to have not acted with sufficient "affirmative misconduct" to estop the government. The instructions he failed to comply with were contained in a claims manual, a volume containing help and guidance but not carrying the weight of law. *Schweiker v. Hansen*, 450 U.S. 785 (1981). Yet the possibility of a government agent conducting the government's business in a sufficiently prejudicial manner as to estop the government from future legal action was again left open. *Id.* at 780.

Heckler v Community Health Services of Crawford City, Inc., 104 S. Ct. 2218 (1984), involved a provider of health care that had relied on policy determinations made by a fiscal intermediary. The health care provider, experienced with government financial programs, knew or

should have known to verify with the applicable governmental department the information received. Thus the inaccuracy of the information given did not estop the government in legal action. *Id.* at 2223.

All of these denials of estoppel left open its possibility. The case at bar can be distinguished from each on its facts. *Schweiker* and *Montana* were both cases of brief, one-time encounters with officials who gave cryptic, verbal advice. By contrast, Mr. Tull, after extensive research by his own agents, initiated a tour and inspection of his property with the specific intent of gaining a ruling from a team of officials from the Corps of Engineers who possessed the requisite knowledge. The Corps continued to monitor the construction site for the next five years.

Mr. Tull is not in the position of Mr. Hibi. He did not ask the government to expend strenuous efforts to inform him of the law. Tull hired a lawyer and an engineer and went to the trouble of arranging an inspection to confirm his understanding of the law; and then complied with it as presented to him. He did not ask his questions of an intermediary as did Community Health Services of Crawford City, Inc. He went straight to the proper governmental authority in his area.

The Supreme Court has stated that for estoppel to lie against the government the private party must at least show "the traditional elements of an estoppel." *Heckler*, 104 S. Ct. at 2224. It explicitly included reasonable reliance. *Id.* at 2223.

Summarizing the traditional notion of equitable estoppel the Ninth Circuit identified four essential elements. They are "(1) The party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) The latter must be ignorant of the true facts (sic.); and (4) He

must rely on the former's conduct to his injury." *California State Board of Equalization v. Coast Radio Products*, 228 F.2d 520, 525.[1] Modifying element (4) to read "he must *reasonably* rely on the former's conduct to his injury" yields a test well within the Supreme Court's standard. *Heckler*, 104 S. Ct. at 2223, 2224.

The case at bar fits all the elements of equitable estoppel. Respecting element one, the Corps certainly knew the facts. Its agents were invited to Mr. Tull's property as work commenced, toured the property, and received a description of the intended work. Though firm drawings were not available for review, the object of the inspection as presented by Mr. Tull was to reach an understanding of the limits of the Corps' interest in the property. Certainly the actions of the inspection party in touring all the properties and not just one site reinforces this. It is undisputed that Tull did no more than he said he planned to do and that the work found by the Corps to be violative of the law was the planned work—obvious to the Corps over the course of five years' surveillance. It had to have been obvious to the Corps many times between July 1976 when the inspection was conducted and July 1981 when the complaint was filed that Mr. Tull was engaged in the work he had explained to the Corps officials. The Corps' agents conducted follow-up inspections, wrote internal memos, and recorded work progress with aerial photography. All attests to their knowledge.

As to element two, if Mr. Tull didn't have the right to believe and rely upon the Corps officials then there simply can't be a case where element two is met. He did what could reasonably be expected to make it clear that he intended to build pursuant to his own experts' opinions unless the Corps raised some objection. The Corps did not object to the purpose of the requested inspection.

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[1] *See also United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 fn. 4 (1970) and 28 Am. Jur.2d, *Estoppel and Waiver*, § 27 (1966).

Significantly, wholly consonant with Mr. Tull's stated expectations and consistent with his purpose, Corps officials forbade certain construction work. Mr. Tull fully complied with the Corps' instructions. The Corps should not be permitted to pretend that it didn't know what was intended by Mr. Tull and by the Corps officials when the inspection was requested and conducted.

The "true fact" of which Mr. Tull was ignorant was that the measures he had taken to ascertain the Corps' interest in his property were inadequate. He believed he had achieved an understanding with the appropriate officials of the Corps of Engineers. He was ignorant of, and reasonably so, the "true facts" as purported five years later by the Corps that he had only obtained a ruling on one particular piece of the whole work.

Finally, I differ with the majority and find clear error in the trial court's ruling that no action or inaction by the Corps misled Mr. Tull. I would find that he did reasonably rely on the combination of actions and inactions by the Corps. Indeed, until I read the holding in this case I would have held it would be unreasonable for Mr. Tull *not* to rely on the United States Army Corps of Engineers. Both I, and Mr. Tull, know better now. As evidenced by the outcome of the trial he certainly relied to his injury.

Were this a case between two private parties the inquiry into estoppel could end here. I think Tull would win hands down. However, as reviewed earlier, estoppel against the government is justifiably eyed warily. Justice Rehnquist wrote a concurring opinion in *Heckler*, 104 S. Ct. at 2228, to refute any "impression of hospitality towards claims of estoppel against the government" that the majority's opinion might have left. He concluded that "our cases have left open the possibility of estoppel against the government only in a rather narrow possible range of circumstances." *Id.*

I believe the circumstances of this case lie within that narrow range. The actions and nonactions of the government agents involved were so far removed from effectively carrying out their duty as to show active efforts to mislead Mr. Tull to his detriment. They were "out to get him." The record supports a suspicion of intentional malice. In possession of all the facts the Corps waited until after lots were sold, when the most harm could be done, to file suit. With full authority to do so, the Corps refused to issue a cease and desist order as their controlling regulation, carrying the weight of law, required. Fed. Reg. Vol. 40, No. 144, 25 July 1975, p. 31330, Addendum "C." The guardians of the nation's wetlands eschewed diligence for trickery.

Although typically inaction on the part of the government would not justify reliance, or bring about estoppel, the inaction consequent upon the inspection tour, the research done by Mr. Tull's agents, and the surveillance, permit Mr. Tull reasonably to conclude approval. Hence, I am not proposing to "punish" the Corps for mis-, mal- or nonfeasance by allowing Mr. Tull to break the law. Rather, I urge the application of estoppel on behalf of a citizen who made a reasonable and good faith effort to discover the law and how it applied to him and has been severely damaged by reasonably relying on the combination of actions and nonactions of government officials, the latter in gross neglect of duty.

The Ninth Circuit found in *Sun Il Yoo v. Immigration and Naturalization Service*, 534 F.2d 1325 (1975), "affirmative misconduct" on the part of the government sufficient to estop it in relation to an alien who had acted in good faith. The Court found no acceptable reason for a delay of ten months in processing information provided by the alien. The delay made Mr. Yoo ineligible for a visa because of a change in the law that occurred while the INS procrastinated unjustifiably on his application. Mr. Yoo was fully eligible under the law as it stood

when he applied. The Ninth Circuit found that "[b]y its maneuvers . . ., the INS [had] ensnared petitioner in a 'Catch 22' predicament; the Service's conduct is analogous to the entrapment of a criminal defendant and, as such, cannot be countenanced." *Id.* at 1328-29.[2]

Mr. Tull's case is even more easily a source of offended decency than Mr. Yoo's. The actions of the Army Corps of Engineers gives the appearance of lying in wait with a calculating eye for five years after first lulling him into a reasonable view that his activities were acceptable; and after he invested time, money, and effort in completing what he thought to be suitable residential lots, the Corps with a bulging portfolio of evidence descended on him. For the foregoing reasons I would apply estoppel and reverse the trial court's decision.

Turning now to the question of defendant's right to a jury trial, I disagree with the majority and find error in the trial court's denial of Mr. Tull's demand for trial by jury.

33 U.S.C. § 1319(b) authorizes the government to bring civil actions in a federal district court to obtain appropriate relief, including typical equity relief, for any violation of specified sections of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* In addition, Section 1319(d) provides for the imposition of a fine under the denomination of a civil penalty. Under subsection (d) the trial court imposed a $75,000 civil penalty without the benefit of a jury's judgment and with this I disagree.

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[2] An Arizona district court applied the "affirmative misconduct" interpretation of *Sun Il Yoo* to a case in which a lawyer was hired by the government, a hiring freeze was put into effect, the lawyer was informed upon inquiry the freeze would not affect his position, the lawyer closed out his private practice in reliance on the assurance and was then denied the job. The district court applied estopel against the government. *Beacom v. Equal Employment Opportunity Commission*, 500 F. Supp. 428 (1980).

The Supreme Court held in *Curtis v. Loether*, 415 U.S. 189 (1974), that the collection of $250 in punitive damages pursuant to a statutory right created by § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, was an action at law that implicated Seventh Amendment rights to trial by jury. The Court specifically rejected the argument that the Seventh Amendment was not applicable to new causes of action created by congressional enactment and reiterated its ruling that the Seventh Amendment applies to causes of action based on statutes. *Id.* at 193, *citing Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962). "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies." *Id.* at 194. Legal rights are those recognizable at law as opposed to equitable rights which are recognizable only at equity. Ballentine's Law Dictionary 720 and 411 (3d Ed. 1969).

Explaining the meaning of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the *Curtis* court declared that *Jones v. Laughlin* gave no help to a party attempting to block a jury trial when statutory rights are at issue. "*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative procedings, when jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in a statutory scheme." *Curtis* at 195. The Court then discusses similar reasons for rejecting Seventh Amendment rights in bankruptcy proceedings and continues "but when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Id.*

Continuing, the Supreme Court found punitive damages sued for under § 812 of the Civil Rights Act of 1968 to be "legal rights." "Damage action under the statute sounds basically in tort—the statutory remedy defines a new legal duty. . . ." *Id.* ". . . this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is a traditional form of relief offered in the courts of law." *Id.* at 195-6.

As noted, and relied on, by the majority, the Court then states that all monetary relief is not legal relief. But the Court continued by "sharply" contrasting an equitable award of backpay in a Title VII case "with § 812's simple authorization of actual and punitive damages." *Id.* at 197. Further analyzing damages arising from statutory rights the Court reasoned, "nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." *Id.*

I place no stock in the difference in nomenclature between the "civil penalty" of the present case and the "punitive damages" in *Curtis*. Both arise from a right created by statute. Both deprive defendant of money by action of court as a result of a breach of the civil law. Both are remedies typically found at a court of law. Neither can be "viewed as requiring a defendant to disgorge funds wrongfully withheld." In neither case is there a functional justification to deny a jury trial. The majority simply accepted the phrase from *Curtis* out of context, as the government invited us to do in its brief, and decided the jury question wrongly.

It should be noted that both *Hepner v. United States*, 213 U.S. 103 (1909), and its follow-up, *United States v.*

Regan, 232 U.S. 37 (1914), which the majority unsuccessfully seeks to distinguish, were decisions settling a debate over whether penalties in the form of so-called civil fines transformed a civil case into a criminal one. The answer was no. Neither case purports to comment on the issue at hand; whether civil penalties may be imposed under the pseudonym of "equitable relief." Both these cases were tried before juries. The *Hepner* court, presupposing a jury, was concerned with making it clear that a judge could direct a verdict if it came out at trial that there were no facts in dispute. Explicitly restricting its decision to civil cases with undisputed testimony, the court said, "the defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict according to the law if the evidence is uncontradicted and raises only a question of law." *Hepner*, 213 U.S. at 115.

The majority observes that there was a statutory limit ($1,000) on the fine imposable in *Hepner* and *Regan* and that the fine imposable against Mr. Tull was unlimited. This, the majority argues, supports a view that the defendants in *Hepner* and *Regan* were entitled to a jury while Mr. Tull was not. One would think just the opposite would be the more persuasive argument. Surely if the Seventh Amendment protects one from a civil fine of $1,000, it should be construed to protect one from a civil fine of $75,000 or an unlimited fine. Cf. 42 U.S.C. § 1995; *United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982); *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

Regan and *Hepner*, then, support Mr. Tull's right to trial by jury. Language in these opinions which may appear to the contrary deals only with situations where there is no genuine dispute as to a material fact.

A trial judge's unlimited discretion in meting out fines and imprisonment to contemnors of his court has long been recognized as an essential element of his authority to maintain the order, respect, and dignity of the court. Indeed, the ability to punish for contempt is deemed essential to the maintenance of our courts as functioning tribunals.

Precedent held that the authority to punish for contempt was so essential to the maintenance of our judicial system, the bedrock of the rule of law, that trial by jury could not be permitted to interfere with the determination of punishment by the judge. *Bloom v. Illinois*, 391 U.S. 194, 208 (1968). Upon reviewing the need for unfettered judicial power to maintain the dignity of the court against the contempt defendant's right to a jury, the Supreme Court in *Bloom* [3] opted for trial by jury. This upsetting of precedent and the recognition of the right to a jury trial despite the serious, even fundamental, considerations to the contrary, shows the strength of our Constitution's [4] demand that the right to trial by jury be not infringed.

If in contempt proceedings the weighty considerations counseling against jury intervention are set at naught

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[3] "[I]n our judgment, when serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court." "We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial." "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."

Bloom, 391 U.S. at 208, 209.

[4] If the instant action be considered civil, the Seventh Amendment requires a jury. If, despite, *Hepner*, *supra*, the imposition of a "civil penalty" of $75,000 be considered criminal, the Sixth Amendment requires a jury.

against the right to a jury trial, how much more is the strength of the right when weighed against statutory protection of wetlands. Wetlands are ecologically essential. The dignity of the courts is essential to our very freedom. Surely, if trial by jury is constitutionally demanded despite the need to maintain our court system, it is also demanded despite the need to maintain our wetlands.

The majority infers that the right to jury trial is limited by a party's ability to fit his cause into a relatively constrictive box. The majority says, "the Seventh Amendmant right to a jury trial is limited to suits in the nature of an action existing at common law when the amendment was adopted." Majority Opinion at 9-10. While the statement is true as far as it goes, the Supreme Court has found cause to ever expand what might be included in "the nature of an action existing at common law when the amendment was adopted." In fact the Supreme Court has stated that "in the federal courts equity has acted only when legal remedies were inadequate, the expansion of legal remedies provided by [an act of Congress] and the Federal Rules [of Civil Procedure] necessarily affects the scope of equity." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959).

It is the equity judge's discretion whose borders are limited by the right to a jury trial, and not the reverse as the majority would have it. *See generally Wright & Miller, Federal Practice & Procedure, Federal Rules of Civil Procedure*, Vol. 9, § 2302 (1971). ["If a new cause of action is created by Congress, and nothing is said about the mode of trial, the courts must look to the nearest historical analogy to decide whether there is a right to a jury." "[A] series of [Supreme Court] cases decided since 1959 . . . recognize that there is a strong federal policy favoring trial by jury of issues of fact. This policy by itself may provide the answer in cases in which the historical test gives no clear guidance." "At

a minimum the *Beacon Theatres* and *Dairy Queen* cases lend impetus toward finding a right to trial by jury in doubtful cases. It is highly probable that they do much more than this." "In its decisions since 1962 the Court has shown no inclination to retreat from this judgment that jury trial is now more widely available than it had been in the past."] [footnotes omitted.]

33 U.S.C. § 1319(b) provides for all usual equitable remedies to be available to the government because there is no good substitute for telling a polluter to cease and restore, and to do so immediately. The civil penalty of subsection (d) is another matter entirely. There simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation. Most of us just aren't rich enough to pay a $75,000 fine with out flinching. Before having such punishment inflicted our Constitution and our heritage demands that the facts be presented to a jury of our peers.

Since the remedies sought by the government were both legal and equitable, and the district court may hear both at one time, Fed. R. Civ. P. 1, 2, 18, and the findings of fact necessary to determine what civil penalties, if any, would be adjudged are the same as those to be decided for the equitable remedies sought, the case should have been heard before a jury upon the defendant's demand. *Beacon Theatres, Inc.*, 359 U.S. at 506-510. Therefore, on the issue of jury trial alone, the case should be reversed and remanded for a new trial. On the issue of equitable estoppel the case should be reversed and dismissed.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

[Filed Oct. 30, 1985]

Appeal from the United States District Court
For the Eastern District of Virginia, at Norfolk,
Robert G. Doumar, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Ervin, Chapman and Judge Warriner, United States District Judge, sitting by designation voted to rehear the case in banc; and Judges Hall, Phillips, Murnaghan, Sprouse, Sneeden and Chief Judge Winter voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Sneeden. Judge Warriner dissents.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

[Filed Nov. 4, 1985]

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Warriner, United States District Judge, sitting by designation, voted to rehear the case. Chief Judge Winter and Judge Sneeden voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Russell, Widener, Ervin and Chapman voted to rehear the case in banc; Chief Judge Winter and Judges Hall, Phillips, Murnaghan, Sprouse and Sneeden voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 81-688-N

UNITED STATES OF AMERICA

v.

EDWARD LUNN TULL.

OPINION AND ORDER

This matter came on for a trial by the Court sitting without a jury.

The government filed its original complaint on July 1, 1981. On April 2, 1982, the government amended its complaint. During the course of the trial, the government sought leave to amend its complaint again. Leave was granted, and on October 5, 1982, the government's second amended complaint was filed.

In claim (1) of the second amended complaint, the government charged that between July 1975 and the present, the defendant, without benefit of a permit issued by the United States Army Corps of Engineers, discharged pollutants, namely fill material, into wetlands adjacent to navigable waterways known as Fowling Gut and Black Point Drain. These alleged wetlands were located on properties collectively referred to as Ocean Breeze Subdivisions and specifically referred to as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home

Sites Section B and then Section C. (Section C is shown on the plat of Section B and the three Sections are shown on Exhibits 55A and 55B).

Similar allegations were set forth by the government in claim (2) of its most recent amended complaint. Claim (2) states that sometime between September 28, 1977 and November 14, 1980, the defendant, again without benefit of a permit, discharged fill material into wetlands located on the Mire Pond Camper Sites I and II. The wetlands referred to in claim (2) were likewise alleged to be adjacent to Fowling Gut.

In claim (3) of the amended complaint, the government alleges that the defendant discharged pollutants into wetlands adjacent to Eel Crek, another navigable waterway for the island of Chincoteague. Once again, it is alleged that the defendant failed to apply for a permit prior to placing fill material on the described wetlands.

The government asserts that in filling of the wetlands without a permit the defendant has violated the requirements of the Clean Water Act. 33 U.S.C. §§ 1311, 1344 and 1362(7). Relief is sought pursuant to 33 U.S.C. § 1319.

In its second amended complaint, the government further charges that the defendant filled a navigable waterway of the United States, namely an extension of Fowling Gut, which at one time traversed through Ocean Breeze Mobile Home Sites. The government claims that this extension of Fowling Gut was filled, blocked and closed by the defendant without the authorization of the Secretary of the Army and recommendation of the Chief of Engineers. Relief is sought pursuant to 33 U.S.C. §§ 406; 1319.

The defendant has denied liability on all counts. Additionally, the defendant has raised several affirmative defenses which will be hereinafter discussed in detail.

A lengthy trial before the Court thus ensued. Based upon the factual findings and legal conclusions embodied within this opinion, judgment will be entered for the United States of America.

I.

A long time inhabitant of Chincoteague, defendant Tull is actively engaged in the business of filling and developing residential resort properties on the island. In this action, the Court shall only concern itself with Mr. Tull's alleged activities on the properties commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, (all of which comprise the Green Breeze Subdivision), Mire Pond I, Mire Pond II (both of which comprise Mire Pond), Eel Creek (not yet subdivided into lots) and a body of water hereinafter sometimes referred to as "Fowling Gut extended".[1] A brief general description of these properties will provide the backdrop for the analysis of Mr. Tull's alleged activities thereon.

The Ocean Breeze Mobile Home Sites are located on the Southwestern portion of Chincoteague Island, Virginia. They lie southeast of Chincoteague Channel and northwest of Black Point Drain and Assateague Channel. (See Exhibit 10). Portions of Ocean Breeze Mobile Home Sites abut Fowling Gut and lie atop what is Fowling Gut Extended, a winding navigable waterway which feeds into Chincoteague Channel to the west and into Andrews Landing Gut to the south. On Exhibit 10 Ocean Breeze Mobile Home Sites is circled and lies approximately at the letter "g" of the word "Fowling" and proceeds northeasterly atop said waterway approximately 1000 feet.

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[1] This has been referred to as a "canal" or waterway but is distinguished from "The Canal" shown in Exhibit 10 which is the main channel from Chincoteague Channel to Assateague Channel (See Exhibit 10).

An extension of Ridge Road, Virginia State Route 2102, traverses Ocean Breeze Mobile Home Sites in a southwesterly direction. Initially Ridge Road only extended into the property immediately adjacent to and east of what is now the subdivision of Ocean Breeze Mobile Home Sites and was the only public road which served the subdivision. A service road built and maintained by the defendant Tull, now bounds the Ocean Breeze subdivision to the south, and is referred to on one plat as "Bunker Hill Campground Road"[2], which road was filled in by Mr. Tull. As is shown on a registered survey plat (Ex. 55A) prepared by Mr. Ralph Beebee, the following lots are situated and have been developed to the northwest of Ridge Road and to the south of what is left of a portion of Fowling Gut (and a 50 foot wide reserved right of way which runs through the top or northeastern portion of the subdivision): Lots 23-70, 120-121; Drain Field Lots 23-38, 39-54, 54-70; and several lots denominated as Future Drain Field Lots. To the southeast of Ridge Road the following Ocean Breeze Mobile Home Sites lots are shown on the survey plat: Lots 1-22, 71-119 and six lots denominated as Future Drainfield sites.

Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B (Ex. 55B) are separated by a lane approximately 22 feet wide which is designated on the defendant's subdivision plats as "Drainage Easement." In actuality, a very narrow ditch approximately two feet wide is located within this area. The following lots comprise Ocean Breeze Mobile Home Sites Section B: Lots 1B-78B, inclusive. Ocean Breeze Mobile Home Sites Section C borders Ocean Breeze Mobile Home Sites Section B to the northeast. At present Ocean Breeze Mobile Home Sites Section C is composed of four 50 foot by 100 foot lots; 8C, 9C, 10C and 11C and one 80 foot by 100

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[2] Bunker Hill Campground is another development of Mr. Tull not at issue in this lawsuit.

foot by 100 foot lot; 7C is shown on the same plat as Ocean Breeze Section B.

Sea Shore Drive bounds those numbered lots developed on Ocean Breeze Mobile Home Sites Section B to the southeast. Between Sea Shore Drive and Bunker Hill Campground Road lie three unnumbered lots which are designated as drainfield lots. To the west of the subdivision of Ocean Breeze Mobile Home Sites B was an undeveloped area which, at the time of the Court's September 1982 view of the property, gave the appearance of a swamp or a bog.

With the exception of a few drainfield lots, the majority of lots in Ocean Breeze Mobile Home Sites measure 50 feet by 100 feet. In Ocean Breeze Mobile Home Sites Section B, most lots likewise measure 50 feet by 100 feet. Some of the lots adjoining Sea Shore Drive in Ocean Breeze Mobile Home Sites are irregular in shape and are slightly larger than the standard 50 foot by 100 foot lot dimensions.

Ingress and egress within the Ocean Breeze Subdivisions are provided through Sea Breeze Drive, Sea Gull Drive, Sea Shell Drive, Sea Spray Drive and Sea Horse Drive, roadways which run in a northwesterly direction and generally perpendicular thereto are Ridge Road Extended and Sea Shore Drive, all of which were developed by defendant Tull from 1975 onward. Approximately 150 feet to the south of and parallel to Sea Shore Drive is Bunker Hill Campground Road.

The defendant claims to have owned all the lots in Ocean Breeze Subdivisions. At various intervals, beginning in 1975, and continuing until the present, the defendant either leased or sold these lots in Ocean Breeze to third parties, many of whom have placed mobile homes on their parcels. Defendant Tull is currently involved in a separate lawsuit with regard to the title to some of the area in the Ocean Breeze subdivision, but for

this Court's purposes, that litigation is not material to this lawsuit. As of the date of trial, Lots 4, 14, 19, 64, 65, 66, 67, 68, 69, 70, 74, 76, 96, 97, and 106 were still owned by the defendant. Currently, the defendant also owns lots 7C, 8C, 9C, 10C, 11C, 11B and the drainfield lots. The defendant realized approximately $5,000 net profit per lot for the sales of the lots in Ocean Breeze Mobile Home Sites.

Mire Pond I and Mire Pond II Camper Sites are located a few miles northeast of the Ocean Breeze Mobile Home Sites. The Mire Pond properties also lie east of Chincoteague Channel. Fowling Gut borders the Mire Pond properties to the west. Virginia State Route 2102 abuts Mire Ponds I and II to the east. (See Ex. 116 which shows both sections).

Mire Pond I consists of twenty-nine smaller sized and sometimes irregularly shaped lots, suitable for the placement of camper trailers. At no time material to this action did the defendant own the lots in Mire Pond I. Although the present owners of the lots in Mire Pond I purchased their properties directly from the defendant's parents, who were the then title holders to those properties, the defendant played the instrumental and paramount role in the development and sale of the lots located in Mire Pond I and otherwise dealt with them as his own.

Mire Pond II adjoins Mire Pond I to the northeast. It is composed of twenty-five lots. At one point, the defendant owned all the land comprising Mire Pond II. Lots 1(a), 6(a), 7(a), 8(a), 9(a), 10(a), 11(a), 12(a), 13(a), 14(a), 15(a), 16(a), 19(a), 20(a), 21(a), 22(a), and 25(a) are presently owned by the defendant. A preliminary injunction issued by this Court at an earlier date, which currently remains in full force and effect, prohibits the defendant from conducting any filling activities whatsoever on Mire Pond II. The defendant and those for whom he acted recognized approxi-

mately $5,000 net profit per lot for the sale of lots in Mire Pond I, as well as Mire Pond II.

The third property involved in this lawsuit, Eel Creek, lies west of Assateague Charnel and Piney Island and flows into Little Oyster Bay. Chicken City Road is to the west of the Eel Creek property, with the Eel Crek waterway itself, abutting the land to the east. The Highland Park Development projects bounds the subject property to the northwest and the Donald Birch property to the southeast. On Exhibit 58 the property identified as "Edward L. Tull" has been split by a road owned by Tull which runs down the middle thereof from Chicken City Road to Eel Crek. The northeastern side of the road is still owned by Tull, a portion of which is in contention in this litigation. The southwestern side of the road is owned by Donald Birch. Although the Donald Birch land was filled by Tull, it is not in contest herein nor has the United States made the new road a part of this litigation.

The defendant owned the described property at Eel Creek. At trial, he testified that at present there exists pending contracts for the sale of certain parcels. The defendant has traded with Donald Birch one-half of his Eel Creek property which is further upstream from Little Oyster Bay. Others (specifically including William M. Birch and the government—highway department) have also obtained rights along Eel Creek which are further upstream.

Asserting a special grant from the sovereign, the defendant also claims ownership to the bottom of Eel Creek itself. The evidence, however, failed to show an unbroken chain of title spanning from an original special grant of Eel Creek by the sovereign to the defendant. Nonetheless, even though the defendant may have acquired rights to the other side of Eel Creek, he could not extinguish the public's rights to the waterway, nor those of others who are upstream. Nor can he extinguish the rights of the United States to its navigable servitude.

The defendant now owns or at one time owned three dump trucks, a front-end loader and a tractor equipped with grading blade. Additionally, the defendant owns and maintains a borrow pit from which vast amounts of fill material were taken and hauled to the subject properties.

On July 21, 1976, several members of the Norfolk District Army Corps of Engineers visited the defendant's properties on the island of Chincoteague in order to determine the "Corps' jurisdiction" as to any filling activity to be conducted thereon. Although the Chief of the permitting section was not present at this meeting, his immediate subordinate, one Caruthers, was present. For most of the inspection, the defendant was also present.

After briefly viewing a site not at issue in this litigation, the group proceeded to the Ocean Breeze Mobile Home Sites. They approached Ocean Breeze Mobile Home Sites from the Northwest corner (Lots 1-2; 23-30) of the property and proceeded toward Fowling Gut. Caruthers noticed what he believed were wetlands adjacent to a filled area in the Northwest corner and advised the defendant that he would need a permit to fill that area. Thereafter Caruthers walked in a southerly direction across the filled area. The defendant remained in the northwest corner of Ocean Breeze Mobile Home Sites. No further conversation was had between members of the Corps and the defendant. The defendant at no time inquired of anyone as to whether he would be allowed to fill in the southern or western portions of Ocean Breeze Mobile Home Sites without first obtaining a permit. Nor has the defendant acquired nor ever applied for a permit.

The group then viewed the Eel Creek Site. Apparently no conversation was had between the members of the Corps and the defendants during the group's visit to the Eel Creek property. Prior to this visit, however, a formal

notice was sent by the Corps to the defendant on March 3, 1976, ordering the defendant to "cease and desist all further filling in Eel Creek or its wetlands until such time as you [the defendant] have obtained Department of the Army permit." On August 25, 1976, a follow-up letter from Colonel Newman Howard indicated that the cease and desist order would remain in effect, that decision having been confirmed by the July 21, 1976 visit to the Eel Creek site.

From 1978 through 1982, James and Donald Ballard worked almost exclusively for the defendant. Apart from some minor repair work and grass cutting duties, the Ballards devoted virtually all their time to the operation, service and maintenance of the defendant's hauling, loading and grading equipment. They were hired to haul sand to Ocean Breeze Mobile Home Sites.

Another independent haules, one Alexander J. Justice, also hauled sand to the Ocean Breeze Mobile Home Sites for the defendant. Justice was paid for at least thirty-four days of hauling.

An aerial photograph of the Ocean Breeze Mobile Home Sites area shows the lots west of Ridge Road (Lots 23-70) were undeveloped as of November, 1975. This photograph shows filling on Lots 1-22 and Lots 93-104. There was, however, no filling on what are now Lots 71-92 and/or Lots 115-119.

The defendant testified that he filled Ocean Breeze Mobile Home Sites Lots 1-22 in 1974-75, filled Lots 104-114 in 1975-76, filled Lots 93-103 in 1975-76, and that filling on Lots 82-92 commenced sometime during 1976-77 and continued through 1979. Filling on Ocean Breeze Mobile Home Sites Section B began in 1976 and continued through 1979. Filling on Ocean Breeze Mobile Home Sites Section C occurred in 1979-80. A revision to the defendant's 1975 survey plat (Ex. 55A) indicates that Lots 120-121 were developed sometime between 1978

and 1979. According to the defendant, the only filling which occurred during 1982 was the filling of some drainfield lots. The government does not seek relief for any filling activity on Lots 1-22 as that was likely completed prior to July 25, 1975. *See* 33 C.F.R. § 323.3(a)(1).

An estimated 20,000 cubic yards of sand were used to fill the Ocean Breeze Mobile Home Sites. Filling activity by the defendant on the Ocean Breeze Mobile Home Sites occurred on at least one hundred separate days. At no time did the defendant apply for, nor did the United States Army Corps of Engineers issue to him, a permit for filling any of the Ocean Breeze Mobile Home Sites.

Similarly, Donald and James Ballard, under the direction of the defendant, hauled sand to fill the Mire Pond Camper Sites. The defendant admitted filling Mire Pond I on behalf of his father, but insists that he remained ten or twelve feet back from a self-imposed restricted area. He professed not to have knowledge as to the identity of the individual or individuals who filled this restricted area. The defendant did, however, state that he aided one lot owner in the construction of a bulkhead. On those lots abutting Fowling Gut (Lots 22, 23, 24, 25, 26), he estimates the fill he placed there to be approximately three feet deep.

Recent photographic slides taken of this area indicate that the majority of the filling on Mire Pond II has occurred since February 1982. As of May 5, 1982, fill material had been placed on those Mire Pond II lots abutting a fence which separates Mire Pond II from Mire Pond I. Thus, it would appear that at least portions of lots 4A, 5A, 6A, 7A, 8A and 9A had some fill material.

Donald and James Ballard also were employed by and directed by the defendant to discharge fill material, namely sand and oyster shells, on the Eel Creek property at various intervals from approximate the year 1977 until and including the duration of this action. Filling

on the Eel Creek site was achieved principally by means of bulldozing and grading of a hill located on the upper-portions of this property. The defendant owned the grading equipment used by the Ballards in the filling of the Eel Creek Site. Akin to his actions vis-a-vis the Ocean Breeze Sites and the Mire Pond Sites, the defendant did not apply for a permit prior to engaging in any filling activity on the Eel Creek property.

The government introduced substantial credible evidence to show that the fill material placed by the defendant on portions of these properties was placed on land which was typically tidal, marsh or bog in character. Soil analyses were performed by the government's experts upon various samples taken from portions of some of these properties to determine the composition of the vegetation lying beneath the fill material.

Government field scientists extracted soil samples from a site located on Lot 121 on Ocean Breeze Mobile Home Sites and from a point on property situated between Lot 120 and Fowling Gut. A subsequent analysis of these samples showed that peat lies beneath the fill material. Peat is wetland plant material with a high water content which causes anerobic soil conditions and which is usually found near the surface. This sample also revealed an abundance of spartina alterniflora, an obligate wetlands species. In combination, peat and spartina alterniflora strongly indicate the existence of a wetland type environment.

Similar analyses were performed upon random soil samples taken from sites on Lots 39(B), 59(B) and 72 (B) in Ocean Breeze Mobile Home Sites Section B. The sample taken from Lot 39(B) showed a predominance of peat and spartina patens, a facultative plant species which may appear in wetlands or uplands. The analyses performed upon the soil samples taken from Lots 59(B) and 72(B) showed peat and distichlis spicata. Distichlis

spicata is generally recognized as an obligate wetland species.

Samples taken froma site on Lot 9(C) likewise showed all peat. Although the vegetation was not distinguishable, a few loblolly pine needles were found in the sample. Loblolly pines usually are found on the ridges of wetlands and their branches and needles frequently project over wetland areas.

Core samples from property immediately adjacent to Ocean Breeze Mobile Home Sites were also examined. From four sites on property adjoining the northeasternmost section of Ocean Breeze Mobile Home Sites, the government's field scientists discovered peat, mixed with a small amount of sand, and distichlis spicata. A sample was likewise taken from property immediately adjoining Ocean Breeze Mobile Home Sites to the south. This sample revealed peat and spartina alterniflora, an obligate wetland species. A sample taken from property lying further south showed an abundance of sand, from which the remnant plant parts could not be identified.

Because the topographic evidence tended to show that a ridge and swale system had formed in portions of Ocean Breeze Section B and the property adjoining it to the northeast, the Court engaged the services of an independent expert witness, Professor Donna M. E. Ware, to determine the speciation of the flora found within this apparent ridge and swale system. Accompanied by the Court and counsel for all parties, Dr. Ware visited this section of the island and examined the vegetation. She opined that the species of saltmarsh grasses (spartina patens, distichlis spicata and spartina alterniflora) and the iva frutescence she observed on the dune swales in this system had developed under "a regime of tidal connection with saltmarshes" on the southwest sector of Ocean Breeze Mobile Home Sites Section B. Dr. Ware further was of the opinion that these swales supported

other species which are known to exist in both brackish and fresh water conditions. Dr. Ware believed that, with the sole exception of polygonum punctatum (dotted smartweed), these facultative species also developed due to a tidal connection with those marsh grass species lying to the southwest of Ocean Breeze. It was Dr. Ware's opinion that the polygonum punctatum probably invaded the saltmeadow habitat when the system became less saline subsequent to the curtailment of the described tidal connection.

Other evidence tended to show that the soil taken from these sample sites was saturated and was subject to tidal inundation. Dr. John Clay, a soil scientist, also examined the composition of the soil taken from lots near the southern end of Route 2102 in order to ascertain the soil's color, wetness and texture. Dr. Clay opined that the soil he examined reflected a high phase tidal marsh, which was subject to flooding by tidal action. Likewise, Mr. Sumner, an Environmental Scientist for the Environmental Protection Agency, stated that the soil at the sample sites was in a saturated condition. Indeed, the Court itself observed saturated and marsh type soil conditions on the western portions of the Ocean Breeze Mobile Home Sites during the Court's September 20, 1982 view of that property.

Two major sources provide the tidal waters which flow into Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B. One system originates from Assateague Channel, while the other system originates from Fowling Gut, each of which is a navigable waterway. The ridge and swale system which comprises a great percentage of Ocean Breeze Mobile Home Sites Section B is apparently (or was prior to filling) interconnected by means of marshes and small streams, flowing to Black Point Drain and Assateague Channel.

The area now encompassed by the Ocean Breeze Subdivision is shown on geological survey maps published by

the Department of the Interior of the United States for civilian use. These maps show a substantial portion of Chincoteague Island. Plaintiffs' Exhibit 135A, is a map dated "1943" and contains a stamp date of December 12, 1962 stamped thereon; plaintiff's Exhibit 10, is dated 1965 and was "photoinspected 1973"; on the rear side of Exhibit 10 and attached thereto is a map dated 1965; and Ex. 134A is the 1965 map photoinspected as of 1979. Exhibit 10 shows that Fowling Gut (as labeled on that plat) is beneath what is now Ocean Breeze Mobile Home Sites. Fowling Gut continued on to Andrews Landing Gut and thereafter into Assateague Channel. The 1943 map shows the entire area of what is now the Ocean Breeze Subdivisions as swamp. The 1973 photoinspected map shows that the Ocean Breeze Subdivision include both swamp and water filled land together with some dry land.

There is no question that the Ocean Breeze subdivisions (including Sections B and C) contained substantial swamps, waterways and ponds prior to the defendant's acquisition and filling. A mere glance at Exhibit 134A, the photoinspected 1979 official map, shows that Sections B and C of Ocean Breeze lie between what is shown on that official map as "Trailer Park" and the non-labeled record as being mostly ponds and water connected to tidal areas. This area of ponds and swamp was filled and later became Sections B and C of Ocean Breeze. The defendant contends that these ponds and the water therein was fresh water and non-tidal. The Court finds that it was tidal water and that the only reason that any portion may have become something other than tidal water (i.e., fresh water) was due directly to and as a proximate result of the defendant's filling activities thereon. The Court specifically declines to lend credence to those witnesses for the defendant who testified contrary to this finding.

The Court finds that the defendant filled in wetlands on the tidal and navigable waters of the United States

located on the following lots in Ocean Breeze Mobile Home Sites: 120, 121, 39B, 59B, 62B, 71B and 72B, all of which were either under water at the time of the Court's view or were shown by core samples to have been wetlands.

Lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites are or were wetlands on the waters of the United States. Any fill located on these said lots designated with a C shall be removed and restored by the defendant in accordance with the directions of the Army Corps of Engineers.

The Court further finds that part or portions of the following streets were at one time wetlands of the navigable waters of the United States filled by the defendant without a permit: Sea Breeze Drive, Sea Gull Drive, Sea Shell Drive, Sea Spray Drive, Sea Horse Drive, Sea Shore Drive and Ridge Road.[3]

The Court finds that more than one day each of filling activity by the defendant occurred with regard to each and every lot and each and every street above-mentioned as having wetlands thereon which were filled by the defendant, as well as a minimum of one day for each and every street above named.

At Mire Pond I, soil analyses were performed on samples taken from Sites on Lots 25 and 29. In the sample taken from Lot 25, peat and spartina alterniflora were found. An examination of the sample extracted from Lot 29 revealed the presence of peat, a substantial amount of distichlis spicata and a random incidence of spartina patens, all of which are found in wetlands.

In examining the aerial photographs and considering all of the evidence, substantial portions of Lots 22, 23, 24, 25 and 26 were wetlands subject to tidal action in Septem-

[3] In addition, the Court finds that several of the lots designated "Drainfields for Lots" were wetlands in 1977.

ber, 1977, and were part of the "waters of the United States."

A field survey of the surface vegetation was made by the government's field scientists on December 14, 1981 in Mire Pond II.[4] The government's field survey disclosed the existence of spartina alterniflora on what appears to be Lots 13A and 22A. Reeds (a facultative plant) and spartina patens has been growing on portions of Lots 8A, 9A and 10A. Spartina patens, distichlis spicata and iva frutescence were observed on portions of Lots 4A, 5A, 6A and 7A. The Court itself walked upon this land in September of 1982 and portions of Lots 8A, 9A, 10A, 11A, 12A, 22A and 13A were under water. Lot 8A had contained some fill material. The Court finds that Lots 8A, 9A, 10A, 11A, 12A, 22A and 13A are wetlands and within the waters of the United States and are tidal waters.

During its view of the Mire Pond Camp Sites, the Court observed crab pots lying at the bottom of Mire Pond itself. The water was approximately five or six feet deep and flowed into Fowling Gut which likewise appeared to be four to six feet deep. It is this same Fowling Gut which once flowed through what is now Ocean Breeze into Assateague Channel, which now only flows into Chincoteague Channel from Mire Pond. At the time the Court viewed the premises, there was approximately 9 inches of standing water on Lot 8A, and that lot was undoubtedly a swamp.

The Court finds the marsh-type environment located at Mire Pond II was essential for the sustenance of the marine ecosystem in that area.

The Court further finds that this wetlands march (inundated by tidal water) which existed in Mire Pond II at the time of the view likewise existed in Mire Pond

[4] See Exhibit 78.

I prior to the filling therein by the defendant. The testing, the natural countour of the land and the plant material found in Mire Pond I and II indicate that Lots 22, 23, 24, 25, 26 and 29 of Mire Pond I are or were partially or completely filled wetlands, having been filled by or at the direction of the defendant. Five of these lots abutted Fowling Gut (at this point called Mire Pond) itself, were subject to tidal inundation and were thus part of the waters of the United States. The Court finds that the defendant was responsible for the fill material deposited on the above-enumerated lots. The Court further finds that the defendant filled Lots 8A, 22, 23, 24, 25, 26 and 29 of Mire Pond I and Mire Pond II without first applying for the necessary permits from the United States Army Corps of Engineers as these lots were part of the waters of the United States. The Court finds at least one day of filling occurred at the plaintiff's direction for each of the above-enumerated lots or a minimum of seven separate days of filling on said six lots in Mire Pond I, and at least four separate days of filling in Mire Pond II wetlands.

On the defendant's property at Eel Creek, there was shown the presence of peat, spartina alterniflora and spartina patens, all wetland species. Eel Creek is a navigable waterway and is tidal in nature flowing into Little Oyster Bay which flows into Assateague Channel. In viisting the Eel Creek property on September 20, 1982, the Court observed marsh covering all but the northernmost 15 feet of the adjacent Lot 14 in the Highland Park Development. The topography of the land would indicate that the adjacent property followed the natural contour as shown in the hatched area on Exhibit 6A. At the time that the view was made, the adjacent Highland Park Lot 14 was under water, except for the northernmost 15 feet thereof.

Akin to Mire Pond, the marsh located at Eel Creek furnishes necessary nutrients to the fish and other marine inhabitants of Eel Creek.

The evidence showed that approximately 6,000 square feet of land had been filled, not including the proposed road built by the defendant and the area of a like amount which the defendant has already sold to another purchaser.

The defendant contends that since he filled the part of the propety with oyster shells and other material which he claimed were natural, he did not pollute or contaminate existing wetlands. The Court wholly rejects this view.

Therefore, the Court finds that the defendant filled on his property at Eel Creek the northern 6,000 square feet, that this placement of fill took more than two days, and that the fill material was placed in waters of the United States without the defendant having first applied for the necessary permits from the United States Army Corps of Engineers.

The Court finds that the defendant has continued the violation of the statutes in relation to filling material for more than 365 days in each instance.

II.

Based upon observations made by this Court during its September 29, 1982 view of the property and upon the evidence adduced during the course of the hearings, the Court became curious as to whether a waterway in excess of 40 feet in width, which at one time apparently traversed Ocean Breeze Mobile Home Site, was an issue to be considered by the Court in this case. The government responded affirmatively.

The defendant claimed that he was unaware that the government intended to pursue any alleged filling of this former waterway and stated that he had not conducted sufficient discovery with regard to this issue as would enable him to mount a defense. In consideration of the parties' relative positions, the Court deferred the claim

advanced by the government referring to this waterway, and allowed the parties additional time for discovery and rescheduled the trial of this claim for a future time. The trial was resumed as to this issue after the completion of discovery by the defendant.

On or about January 26, 1963, Nat Steelman, a retired oyster inspector, and other watermen commenced the digging of this contested Fowling Gut Extended waterway at the expense of the United States. The waterway was dug as the result of the severe storm of Ash Wednesday of 1962 and was ostensibly for mosquito control purposes. An ancillary purpose for construction of the waterway was to facilitate and encourage boat traffic.[5]

Fowling Gut Extended was excavated in such a manner that it had a minimum depth of four feet at mean low water and a width of a minimum of forty feet. The property owners (Tull's predecessors in title) were compensated by the government.

Fowling Gut, as distinguished from Fowling Gut Extended (that portion which once ran through and under what is now this subdivision) prior to 1962 had two outlets to Chincoteague Channel by causeway under Main Street on State Route 2114. One of these causeways is at a point near the northeastern corner (Lot 30) of Ocean Breeze Subdivision and one near the northeastern corner of the subdivision (Lot 121). Fowling Gut naturally ran in an east/west direction along the northern boundary of the subdivision between these two causeways and thence ran in a short distance approximately 100 feet in a southerly direction along the eastern boundary of the subdivision (Lots 29 and 30) and then turned and proceeded eastwardly towards Mire Pond and the more populated part of the island and higher ground. It was at this turning point (Lot 29) that Fowling Gut

[5] See Exhibit 141-1 (letter to Roy C. Tolbert, Treasurer of Chincoteague Mosquito Control Commission, dated March 25, 1963).

Extended was excavated in a straight line in 1963 in a southwesterly direction diagonally across what is now the subdivision of Ocean Breeze and that portion under Ocean Breeze is now located under what would be the letter "g" in the word "Fowling" on what is designated as the Coast and Geodetic Survey Map, Exhibit 10, and continued in a southwesterly direction not only through said subdivision but ultimately to Andrews Landing Gut which emptied into "The Canal" on one side and "Assateague Channel" on the other side. This excavation, in effect, created at least two additional islands in the southwestern portion of Chincoteague. Part of what is now Ocean Breeze Subdivision would have been on the mainland side of Chincoteague and part would have been on the island. Thus, Lots 29 through 33; 44 through 51; 57 through 69; Lots 120 and 121; and some drainfield lots would have been completely separated by tidal water at least forty feet wide and four feet deep at mean low water from the remaining lots of what is now Ocean Breeze Subdivision. Thus, the above-enumerated lots could not have been utilized unless a bridge was built on the waterway or the waterway blocked or obstructed in some manner.

Once completed, the waterway was of sufficient width and depth as to become navigable for large boats and for a brief period boats regularly traveled the entire length of this excavated waterway out to the sea. The Court finds that this waterway, Fowling Gut Extended, was navigable in fact and was utilized by boat traffic subsequent to 1963 and prior to the time when the defendant filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineer. Not only was the waterway blocked by the defendant in this subdivision, but the waterway was also obstructed by the construction of Bunker Hill Campground Road by the defendant which is not a part of this particular litigation.

Two November 1975 aerial photographs of the partially developed Ocean Breeze Mobile Home Sites show this waterway still flowing across the property as an open navigable waterway. By late summer of 1976, the section of the waterway which traversed Ocean Breeze Mobile Home Sites was blocked by fill material. The filling of this waterway took place in late 1975, 1976, 1977 and thereafter.

The Court finds that the filling of Fowling Gut Extended, the portion of the waterway beneath what is now Ocean Breeze Subdivision, took more than fifty separate days of filling operation insofar as that portion contained in what is now Ocean Breeze Mobile Home Sites. The evidence indicated that no other individuals or concerns were engaged in filling activity on the Ocean Breeze Mobile Home Sites property during the years in question and the Court from the testimony of the defendant, the various persons engaged in the filling operation, the aerial photographs and the other evidence finds that the defendant was the sole person engaged in the filling of this waterway and that such filling was either done personally by him or at his direction or under his supervision insofar as Ocean Breeze Mobile Sites are concerned. The defendant neither applied for nor obtained any permit from the Corps of Engineers to fill and obstruct this navigable waterway which clearly falls within the ambit of "waters of the United States." Moreover, the defendant profited by his sale of these lots which would not have been accessible as well as those lots (some 40,000 square feet) that were actually a filled navigable waterway. The violation has continued for more than 365 days.

III.

Jurisdiction over this action is conferred pursuant to 28 U.S.C. §§ 1331 and 1345.

Pursuant to 33 U.S.C. § 403, the creation of any obstruction not affirmatively authorized by Congress to the

navigable capacity of any of the waters of the United States is prohibited. Nor shall it be lawful to fill or in any manner alter or modify the course, location, condition or capacity of any canal unless the work is authorized by the Secretary of the Army. 33 U.S.C. § 403 (1970). This statute was enacted by Congress to give the federal government jurisdiction to prevent private parties from obstructing navigable waters of the United States. *United States* v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216 (8th Cir. 1982); *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).

There is no requirement that a body of water must sustain actual commerce in order to meet the test of navigability sufficient to support the Corps' jurisdiction over a proposed obstruction. Rather, the mere capability of commercial use of a body of water will suffice, even if such commerce is made possible with the addition of artificial aids. *Weiszmann* v. *District Engineer, United States Army Corps of Engineers*, 526 F.2d 1302, 1305 (5th Cir. 1976) [*quoting United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940)] *See Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *United States* v. *DeFelice*, 641 F.2d 1169 (5th Cir. 1981. Moreover, the lack of commercial traffic does not foreclose a determination of navigability under this section where personal and private use of boats demonstrates the capability of a waterway for simpler types of boat traffic. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940); *United States* v. *Utah*, 283 U.S. 64, 82 (1931); *United States* v. *Pot-Nets, Inc.*, 363 F. Supp. 812 (D. Del. 1973).

A private waterway may fall within the ambit of navigable waters of the United States if it joins an existing interstate commerce waterway. *See Kaiser Aetna* v. *United States, supra.* Consequently, private canals which are subject to the ebb and flow of the tide and are navigable in fact because they are capable of

flow in the stream of interstate commerce and are or may be so used constituting navigable waterways of the United States for purpose of the Corps' jurisdiction under 33 U.S.C. § 403. *See Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963).

The discharge of any pollutant by any person is expressly prohibited by law, except as provided in sections 1312, 1316, 1317, 1328, 1342, or 1344 of Title 33. 33 U.S.C. § 1311 (1978). Discharge of a pollutant is defined in § 1362 of Title 33 as any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362 (12) (1978). A point source means any discernible, confined and discrete conveyance from which pollutants are discharged. 33 U.S.C. § 1362(14) (1978). As intended by the statute, the term pollutant means any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, radioactive materials, wrecked or discarded equipment, rock, sand, cellar dirt, industrial, municipal waste or agricultural waste, which is discharged into water. 33 U.S.C. § 1362(6) (1978).

Bulldozers and dump trucks constitute point sources from which pollutants can be discharged within the meaning of Federal Water Pollution Control Act. *United States* v. *Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980); *United States* v. *Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974).

Similarly, it has been held that fill material constitutes a pollutant within the statutory definition as expressed in 33 U.S.C. § 1362(6). *United States* v. *Weisman*, *supra*. Fill material composed of sand and debris would necessarily be considered an offending pollutant. *United States* v. *Bradshaw*, 541 F. Supp. 880 (D. Md. 1981).[6]

[6] The United States Army Corps of Engineers regulations define fill material as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(m) (1981).

Pursuant to 33 U.S.C. § 1344(a), the Secretary of the Army is authorized to issue permits for the discharge of fill material into navigable waters of the United States at specified disposal sites. 33 U.S.C. § 1344(a) (1978).

The statute defines the term navigable waters as waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (1978). In so doing, Congress intended to give to the term navigable waters, the broadest constitutional interpretation. *Deltona Corp* v. *United States*, 657 F.2d 1184 (Ct. Cl. 1981); *United States* v. *Byrd*, 609 F.2d 1204 (7th Cir. 1979). Jurisdiction over waters of the United States is said to extend "well beyond the mean high water mark to marsh wetlands which are regularly or periodically inundated." *Conservation Council of North Carolina* v. *Costanzo*, 398 F. Supp. 653 (E.D. N.C. 1975); *aff'd* 528 F.2d 250 (4th Cir. 1975).

The Army Corps of Engineer regulations further define "waters of the United States" to include coastal and inland waters, rivers and streams that are navigable waters of the United States, including any adjacent wetlands. 33 C.F.R. § 323.2(a)(2) (1981). The term "navigable waters of the United States" is described by the regulations as "those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. 33 C.F.R. § 323.2 (b)((1981). As used in 33 C.F.R. § 323.2(a)(2) above, the term "wetlands" includes those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions. 33 C.F.R. § 323.2(c) (1981).

Wetlands generally include swamps, marshes, bogs, and similar areas. Consistent with this definition of wetlands,

Congress and the courts have interpreted the term wetlands to include marshes, bays, and estuaries of waterbodies subject to tidal inundation. *Leslie Salt Co.* v. *Froehlke, supra; Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 511 F. Supp. 278 (W.D. La. 1981); *Conservation Council of North Carolina* v. *Constanzo, supra; United States* v. *Darden*, C/A No. 81-652 (E.D. Va. February 2, 1982) (unpublished).

IV.

The defendant has raised several affirmative defenses to the government's claims. Based upon the evidence adduced at trial, the Court concludes that the affirmative defenses advanced by the defendant do not relieve him from liability for violations of 33 U.S.C. § 403 and § 1344.

The defendant first argues that the statute and the regulations upon which the government relies as the bases for the exercise of its regulatory powers as they have been enforced in the Norfolk District against the defendant (presumably 33 U.S.C. §§ 1311, 1344 and 33 C.F.R. § 323, *et seq.*) are unconstitutional in that the enforcement thereof amounts to a taking of property without compensation in violation of the Fifth Amendment to the United States Constitution. At trial, the Court granted summary judgment in favor of the government as to this issue. Because the defendant has admitted that he never attempted to obtain an Army Corps of Engineers' permit prior to the filling of any of the properties at issue in this litigation his "taking" claim is not yet ripe for resolution. In *United States* v. *Byrd, supra*, the Seventh Circuit was faced with a similar argument from a defendant who had not yet applied for a permit from the Army Corps of Engineers. Holding that the defendant's argument was premature, the Court explained that, absent the rendering of some formal decision on the defendant's application by the Army Corps of Engineers, the defendant would be assuming a "taking" which may never

materalize. *Id.* at 1211. *See also Deltona Corporation* v. *Alexander, supra.* Exhaustion of administrative remedies must necessarily precede any Court's review of a particular agency's action. Defendant Tull's failure to even attempt to exhaust his administrative remedies by applying for a permit from the United States Army Corps of Engineers renders his taking issue untimely.

The defendant next contends that 33 U.S. §§ 1311 and 1344 and the regulation set forth in 33 C.F.R. § 323.3(c) are unconstitutionally vague. As applied to the defendant, these statutes and the implementing regulation are sufficiently definite to have afforded the defendant, an individual of at least ordinary intelligence, fair notice of what conduct was prohibited or required by law. *United States* v. *Harriss*, 347 U.S. 612 (1954). *See United States* v. *Oxford Royal Mushroom Products*, 487 F.Supp. 852, 855 (E.D. Pa. 1980) (terms navigable waters and waters of the United States held not void for vagueness). Furthermore, the Court cannot overlook the evidence indicating that the defendant is a knowledgeable and sophisticated developer, who possesses a rather substantial appreciation for the topography and vegetation on the island of Chincoteague.[7] The defendant's apparent familiarity with Chincoteague island vegetation belies the existence of any misapprehension on his part as to what the pertinent statutes and regulations required of him.

The defendant also seeks to invoke the doctrine of equitable estoppel against the government for statements not uttered and actions not taken by members of the Army Corps of Engineers during the period in which they were allegedly aware that filling was occurring on

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[7] For example, when asked by the Court to describe what he considered to be a marsh, the defendant responded that it was low lying land which could contain water. The defendant also opined that a portion of Lot 22(A) on Mire Pond II inspected by the Court and the parties during its September 20, 1982 view of the property might be marshland.

these properties. The defendant cites the July 21, 1976 visit to the Ocean Breeze Mobile Home Sites as one instance during which the Corps' silence "misled" him. It was during the July 21, 1976 visit that one of the Norfolk District engineers made specific reference only to a prohibition against further filling on the northwest sector of Ocean Breeze Mobile Home Sites. The defendant submits that the government should now be estopped from claiming improper filling activity on other portions of Ocean Breeze Mobile Homes Sites since they were not specifically mentioned during the course of that site visit.

Likewise, the defendant asserts that, although government officials have long been aware that filling has occurred on the Mire Pond Camper Sites and the Eel Creek sites, they have taken no affirmative measures, apart from the commencement of this action, to discourage or prevent the continuation of these activities.

The Court finds this contention of the defendant is without foundation as the Court feels that the agents of the United States government did not mislead the defendant. Particularly with regard to the Eel Creek property, there is no evidence that the Army Corps of Engineers stood idly by while an endless parade of the defendant's dump trucks and bulldozers passed in review. To the contrary, a formal cease and desist order was issued by the Army Corps of Engineers in August of 1976, prohibiting the defendant from any further filling on the Eel Creek property until the defendant had applied for a permit. And as to Mire Pond II, the plaintiff obtained an injunction prohibiting the defendant's filling activities thereon.

Notwithstanding the evidence of the government's more than tepid interest in the defendant's filling activities, inaction or tacit acquiescence by government officials as to unlawful conduct alone cannot provide the basis for the imposition of an equitable estoppel against the United States of America. The general rule is that the United States is neither bound by nor estopped by the acts of

its officers or agents in entering into an arrangement to do or cause to be done what the law does not sanction or permit. *See Federal Crop Insurance Corp* v. *Merrill*, 332 U.S. 380 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). The United States Supreme Court has intimated, but not yet stated conclusively, that perhaps some affirmative conduct by the government's agents might warrant an exception to the general rule against the invoking of an equitable estoppel against the government. *See, e.g., Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981).

In *Deltona Corporation* v. *Alexander, supra*, the Eleventh Circuit held that the record failed to disclose evidence of any affirmative conduct on the part of government officials sufficient to estop the government from denying dredge and fill permits to a developer even though government officials had known of development plans from their inception and had unofficially endorsed the plans. *See United States* v. *Harvey*, 661 F.2d 767 (9th Cir. 1981) (affirmative conduct must be shown in order to invoke equitable estoppel against the government.)

The evidence here failed to disclose any statements or conduct of an affirmative nature conveyed by government officials to the defendant which could have caused the defendant to believe that he was authorized to fill those properties not specifically designated during the visits to the site or contained within the correspondence between the parties without first applying for a permit from the Army Corps of Engineers. Moreover, it has not been shown that any silence or inaction by the government was purposefully designed to mislead or confuse the defendant. The Court therefore finds no basis upon which to invoke the doctrine of equitable estoppel against the United States. *See United States* v. *Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267 (S.D. Fla. 1981) (government agent's delay in issuing a cease and desist order will not estop the government from

enforcing violations under Rivers and Harbors Appropriation Act of 1899 and the Federal Clean Water Act).

Moreover, the defendant and the plaintiff were engaged in other adversary court actions during the relevant time period on different properties. The defendant was thus well aware of the necessity for applying for permits.

The defendant neither requested an application for a permit nor has he obtained a permit for any of the properties involved herein, or indeed any of his properties. Rather, the defendant has chosen to purposely disregard the regular manner of determination in order to assert some basis as justification of his illegal activities. Avoidance is always permissible but the defendant's activities appear to this Court to have been a deliberate attempt at evasion and misdirection by the defendant. Such actions would never support a claim for an estoppel even were the government not involved.

The defendant also argues that the issue as to whether the Army Corps of Engineers has regulatory jurisdiction over Ocean Breeze Mobile Home Sites, Mire Pond I and II and Eel Creek has already been litigated in *United States* v. *Tull*, C/A No. 75-319-N (E.D. Va. November 12, 1975) (unpublished) and *United States* v. *Tull*, C/A No. 73-304 (E.D. Va. March 21, 1974) (unpublished) and therefore should not be relitigated under the principles of collateral estoppel. A copy of the opinions rendered in those two actions was introduced into evidence by the defendant.

The doctrine of collateral estoppel inhibits a litigant "against whom an issue has been decided in a prior final judgment from relitigating its rejected position in a subsequent proceeding." *Hughes* v. *Heyl & Patterson, Inc.*, 647 F.2d 452 (4th Cir. 1981) [citing *Parklane Hosiery Co. Inc.* v. *Shore*, 439 U.S. 322 (1979)]. For this Court to apply the principles of collateral estoppel, the question expressly and definitely raised in this suit must be the same as that actually litigated and adjudged

adversely to the government in either of the cited decisions involving the defendant Edward Lunn Tull. *Hughes* v. *Heyl & Patterson, supra. See Montana* v. *United States*, 440 U.S. 147 (1979).

Having thoroughly considered all the issues presented in the prior actions, the Court is of the opinion that the resolution of the issues in those cases does not bar the present adjudication of any issue in this case. Indeed, the defendant concedes that different properties are involved. Also, the alleged filling conducted thereon appears to have been of a different character than that which is complained of here. As there would appear to be an absence of identity of issues among the three cases, collateral estoppel will not be applied.

IV.

Pursuant to 33 U.S.C. § 406, a district court is authorized to enforce by injunction, the removal of an obstruction placed in navigable waters in violation of 33 U.S.C. § 403. 33 U.S.C. § 406 (1970). Where the navigable capacity of a particular navigable body of water has been unlawfully altered or modified, a district court maintains the requisite injunctive power to order appropriate restoration. *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960).

The government may also obtain injunctive relief against an offending party for violations of 33 U.S.C. § 1311, pursuant to 33 U.S.C. § 1319(1). A district court may also assess a civil penalty against any person who fails to comply with 33 U.S.C. § 1311 or § 1344. 33 U.S.C. § 1319(d).

As this Court sits in equity, as well as in law, it cannot look favorably upon the defendant's unwillingness to seek the permit required by law for any of his filling activities or upon his failure to discuss any possible alternatives to his proposed filling of wetlands with government offi-

cials. Nor can this Court look kindly upon the defendant's apparent refusal to comply with a cease and desist order issued by a United States government agency. Unlike the plaintiff in *1902 Atlantic Limited* v. *Hudson*, C/A No. 82-533 (E.D. Va. ——, 1983) decided this day, wherein the plaintiff not only applied for a permit, but submitted a plan to mitigate damage as to affected wetlands, defendant Tull has shown scant respect for the preservation of waters of the United States.

It would be inequitable for this Court to allow the defendant to benefit from the commission of an unlawful act. For the sale of each lot which he owned, the defendant realized approximately $5,000 net profit per lot. Moreover, more than one day's illegal activities in filling took place with regard to each lot and more than 365 days' violation has taken place in allowing the illegal fill to remain. Thus, for the filling of the wetlands lots 120, 121, 39(B), 59(B), 62(B), 71(B), and 72(B) on Ocean Breze Mobile Home Sites, the defendant is hereby assessed a total penalty or civil fine in the sum of $35,000.00.

Although the defendant at no time material to this action owned lots 22, 23, 24, 25, 26 and 29 in Mire Pond I, sufficient to have derived a profit from their sale, he nevertheless filled the wetlands therein for his own economic benefit. Similarly, although the defendant has not yet sold lot 8(A) on Mire Pond II, his filling thereon was designed to facilitate their sale, and the Court will assess an appropriate penalty for the unlawful filling of the lots on Mire Pond II. Since the evidence showed that at least one day's filling occurred on each of these lots, the defendant shall be assessed a total penalty or civil fine of $35,000.00 for the filling of Lots 22, 23, 24, 25, 26 and 29 and 8(A).

A $5,000 penalty or civil fine shall likewise be imposed upon the defendant for the filling of the wetlands on the 6,000 square foot parcel of land adjoining Eel Creek.

Further, any fill placed on lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites Section C shall be removed, and those lots restored to wetlands within six months from the date hereof *unless* the defendant is granted an after-the-fact permit by the Army Corps of Engineers. The defendant shall post a $10,000 bond with surety to insure completion of the restoration of these lots.

For the unlawful filling of a navigable waterway of the United States, namely the extension of Fowling Gut, the Court ORDERS the defendant to pay a fine in the sum of $250,000.00. The defendant, Edward Lunn Tull, may suspend the payment of this fine on the specific condition that he restore the extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975, through what is now the Ocean Breeze Subdivision, as provided in this Court's opinion. If the defendant so elects to restore the extension of Fowling Gut, he must file a written election with the Clerk of this Court within ten (10) days from the date hereof and shall post a penalty bond secured by a corporate surety approved by the Clerk of the Court in the amount of $300,000.00, payable to the United States conditioned upon the completion of the restoration within twelve (12) months from the date of this order. Further, the defendant shall restore the waterway under the supervision and to the satisfaction of the United States Army Corps of Engineers in accordance with the instructions contained in the Court's opinion. Equity dictates that the defendant either pay a stiff civil penalty or make appropriate restoration for permanently depriving the United States government and its people of a navigable waterway capable of supporting both commercial navigation and pleasure boating.

The defendant is further ORDERED to restore two lots (other than lots 8(A), 9(A), 10(A), 11(A), 12(A) or 22(A)) in Mire Pond Camper Sites II to wetlands as

part mitigation for the lots unlawfully filled by the defendant in Mire Pond I. Third parties have interests in lots 22, 23, 24, 25, 26 and 29 of Mire Pond, and this Court seeks not to punish them for the acts of the defendant. Additionally, the defendant and those who succeed to his rights are permanently enjoined from further filling of any kind in lots 8(A), 9(A), 10(A), 11(A), and 12(A), 13 (A) and 22(A) (the latter six lots also appearing to be wetlands) on Mire Pond II until such time as appropriate restoration of wetlands as required above has been made, (as approved by and under the supervision of the United States Army Corps of Engineers) *and* until such time as the necessary permits are issued for filling on any of these lots if the Corps of Engineers desires to grant such permits in accordance with its rules and statutes. Restoration thereof shall be completed within six (6) months from the date of this order or within such future date as set by this Court. Prior to any such restoration, the defendant shall post a bond in the sum of $10,000 with surety.

It is further ORDERED that the defendant restore to wetlands all portions of the 6,000 square foot parcel of land abutting Eel Creek (previously discussed in Part I of this opinion), which were owned by the defendant at the time of the filing of any lis pendens or the filing of the suit (whichever was earlier). Restoration shall be completed within (6) months of the date of this order or within such future dates as set by this Court and shall be under the supervision of the Army Corps of Engiiners of the United States. Once appropriate restoration has been made, the defendant shall be permanently enjoined from conducting any filling activities thereon until such time as he shall obtain a permit from the United States Army Corps of Engineers. Prior to the commencement of any such restoration on the Eel Creek property, the defendant shall post a bond in the sum of $5,000 with surety.

It is further ORDERED that the costs of this litigation be borne by the defendant. Included within the costs of this litigation shall be an $800.00 expert witness fee to be paid to Professor Donna Ware, which fee the Court specifically finds is reasonable. Should the defendant fail to pay this fee within thirty (30) days from the date of this order, said fee shall be paid by the plaintiff, the United States of America, which the plaintiff may thereafter recover from the defendant.

The Court will entertain a request by the government for a reasonable award of attorney's fees. Such a request should be submitted within ten (10) days in accordance with the local rules.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

September 28th, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 81-688-N

UNITED STATES OF AMERICA

v.

EDWARD LUNN TULL

JUDGMENT ORDER

A lengthy trial before the Court has ensued. Based upon the factual findings and legal conclusions embodied within the opinion this day filed, judgment will be entered for the United States of America against the defendant, Edward Lunn Tull, and accordingly a total penalty or civil fine is assessed as follows:

(1) For the filling of the wetlands on lots 120, 121, 39(B), 59(B), 62(B), 71(B) and 72(B) on the various plats of Ocean Breeze Mobile Home Sites, the sum of $35,000.00;

(2) For the filling of lots 22, 23, 24, 25, 26 and 29 in Mire Pond I, and lot 8(A) in Mire Pond II, the sum of $35,000.00;

(3) For the filling of the wetlands on the 6,000 square foot parcel of land adjoining Eel Creek, the sum of $5,000.00.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED:

(A) That the fill placed on lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites Section C shall be removed by the defendant, Edward Lunn Tull, and those lots restored by the defendant, Edward Lunn Tull to wetlands within six months from the date hereof under the direction of the Army Corps of Engineers *unless* the defendant is granted an after-the-fact permit by the Army Corps of Engineers as conditioned in this Court's opinion;

(B) That the defendant, Edward Lunn Tull, shall restore to wetlands all portions of the 6,000 square foot parcel of land abutting Eel Creek under the direction of the Army Corps of Engineers as provided in the Court's opinion;

(C) That the defendant, Edward Lunn Tull, for the unlawful filling of the extension of Fowling Gut, shall pay a fine in the sum of $250,000.00, however, the defendant may, by an election duly filed in writing in the Clerk's Office of this Court, within ten (10) days from the date hereof, obtain a suspension of said fine on the condition that the defendant, Edward Lunn Tull, agree to restore the extension of Fowling Gut to its former, navigable condition as it existed between 1963 and November 1, 1975, as provided in this Court's opinion, but in which event, the defendant shall post a penalty bond payable to the United States with a corporate surety approved by the Clerk of this Court in the sum of $300,000.00 conditioned upon his restoration within one year of the date of this order said extension of Fowling Gut under the directions of the Army Corps of Engineers in accordance with the Court's opinion this day filed.

(D) That the defendant, Edward Lunn Tull, convert to wetlands two lots in Mire Pond Camp Sites Section II other than lots 8(A), 9(A), 10(A), 11(A), 12(A) or 22(A) as part mitigation for the lots unlawfully filled by the defendant in Mire Pond I.

The defendant, Edward Lunn Tull, and his successors and/or assigns are permanently enjoined from any filling of any kind of lots 8(A), 9(A), 10(A), 11(A), 12(A), 13(A) and 22(A) in Mire Pond Section II until such time as the necessary permits are issued for filling on any of the lots if the Army Corps of Engineers desires to grant such permits in accordance with its rules and regulations and the statute applying thereto.

IT IS FURTHER ORDERED that the chargeable costs of this litigation be borne by the defendant and including therewith shall be at $800.00 expert witness fee to be paid to Professor Donna M. E. Ware by delivering to the Clerk of this Court the sum of $800.00, which sum shall be transmitted by said Clerk to Professor Ware. Should the defendant fail to pay said sum to the Clerk of this Court for transmittal to Profesor Ware within thirty (30) days from the date hereof, then said amount shall be paid by the United States and shall be a chargeable court cost.

All removal, restoration to and/or conversion to wetlands shall be completed within six (6) months from the date of this order unless an extension of time is granted by this Court, except that the restoration of Fowling Gut Extended shall be completed within nine (9) months from the date hereof.

The plaintiff shall file any requests for attorney's fees and expenses within ten (10) days from the date hereof.

Any prior injunction herein shall be null and void upon the entry of and compliance with this order.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

Sept. 28, 1983

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

SECOND AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) of the Clean Water Act, 33 U.S.C. 1311 and pursuant to Section 12 of the Rivers and Harbors Act, 33 U.S.C. 406, to obtain injunctive relief for defendant's failure to comply with Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C.

1319, and 33 U.S.C. 406. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed $10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or after July 1975, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311 (a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt, and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometime commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiff's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

CLAIM FIVE

27. Section 10 of the Rivers and Harbors Act of 1899 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States except as authorized by the Secretary of the Army and recommended by the Chief of Engineers, 33 U.S.C. 403.

28. On plaintiff's information and belief, defendant filled the navigable water of the United States on the real property commonly known as Ocean Breeze Mobile Home Sites without the authorization of the Secretary of the Army and the recommendation of the Chief of Engineers.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three, and Four above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of $10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;

4. This Court enter an injunction requiring defendant to remove the obstruction unlawfully created in the navigable waters of the United States as described in Claim Five.

5. Plaintiff be awarded the costs and disbursements of this action; and

6. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

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/s/ Diane L. Donley
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing First Amended Complaint was hand-delivered, this 5th day of October, 1982, to the following persons:

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APPENDIX F

AMENDMENT VII.
CONSTITUTION OF THE UNITED STATES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq., provides in relevant part:

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.

§ 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures

> Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [33 USCS §§ 401, 403, and 404], or any rule or regulation made by the Secretary of War [Secretary of the Army] in pursuance of the provisions of said section eleven [33 USCS § 404], shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

The Clean Water Act of 1977, 33 U.S.C. 1251 et seq., provides in relevant part:

§ 33 U.S.C. 1311(a). Illegality of pollutant discharges except in compliance with law

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 33 U.S.C. 1319. Enforcement

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 U.S.C. § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

§ 33 U.S.C. 1344(a). Discharge into navigable waters at specified disposal sites

> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

§ 33 U.S.C. 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

Regulations promulgated by the United States Army Corps of Engineers define Clean Water Act jurisdiction in relevant part as follows (33 C.F.R. 323.2(a)-(d)):

Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section. Waste treatment systems, including treatment pond or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.-

11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands".

Regulations promulgated by the United States Army Corps of Engineers establishing the duties of the District Engineer upon learning of a violation or potential violation during the time period applicable to this case are:

§ 33 C.F.R. 209.120(f)(12)(i) (1975). Unauthorized activities

The following procedures will be followed with respect to activities which are performed without proper authorization.

(i) When the District Engineer becomes aware of any unauthorized activity which is still in progress,

he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. In appropriate cases, the District Engineer may also order interim protective measures to be taken in order to protect the public interest. If there is noncompliance with this cease and desist order, the District Engineer shall forward a factual report immediately to the local U.S. Attorney with a request that a temporary restraining order and/or preliminary injunction be obtained against the responsible persons.

§ 33 C.F.R. 326.2 (1977). Discovery of unauthorized activity in progress

When the District Engineer becomes aware of any unauthorized activity which is still in progress, he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. If appropriate, the District Engineer may also order interim protective measures to be taken in order to protect the public interest.

APPENDIX G

USC Section	Name	Civil Penalties	Date Enacted [1]
2 USC § 437g	Federal Elections Campaign Act	(a) (5) (B)-not to exceed $10,000.00 or 200% of any contribution	1/80/80
		(a) (6) (A)-not to exceed $5,000 or an amount equal to the contribution involved	1/8/80
2 USC § 702	Ethics in Government Act	(6) (C) (i)-not to exceed $5,000	10/26/78
2 USC § 706	Ethics in Government Act	$5,000 for each violation	10/26/78
5 USC § 202 (app)	Executive Personnel Financial Disclosure Requirement	(C) (i)-not to exceed $5000	10/26/78
		(C) (ii)-not to exceed $1000	10/26/78
5 USC § 204 (app)	Executive Personnel Financial Disclosure Requirement	not to exceed $5000	10/26/78
5 USC § 1207	Civil Service-Merit Systems Protection Board	(b)-not to exceed $1,000	10/31/78
7 USC § 9	Commodities Exchange Act	not to exceed $100,000 each violation	10/23/74
7 USC § 13a	Commodities Exchange Act	not to exceed $100,000 per violation	10/23/74
7 USC § 86	Grain Standards Act	(c)-not to exceed $75,000 per violation	10/21/76
7 USC § 136	Pesticide Control Act	(a) (1)-not to exceed $5,000 per offense	10/21/72

[1] The date enacted also includes the date amended to provide for civil penalties, when applicable.

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7 USC § 149	Agriculture-Insect Pest	(b) (1)-not to exceed $1,000	1/12/83
7 USC § 150gg	Federal Plant Pest Act	(b)-not to exceed $1,000	1/12/83
7 USC § 163	Agriculture-Nursery Stock	not to exceed $1,000	1/12/83
7 USC § 193	Packers & Stockyards Act	(b)-not to exceed $10,000 per violation	9/13/76
7 USC § 213	Packers & Stockyards Act	not to exceed $10,000 for each violation	9/13/76
12 USC § 1785	Banks & Banking-Federal Credit Unions	(e) (3)-not to exceed $100 for each day of violation	10/19/70
12 USC § 1828	Banks & Banking-FDIC	(h)-not more than $100 for each day of violation	5/13/60
12 USC § 1884	Banks & Banking-Bank Security Measures	$100 per day	7/7/68
12 USC § 1908	Banks & Banking-Credit Control	$1,000 for each violation	12/23/69
12 USC § 3417	Banks & Banking Right to Financial Privacy	(a) (1)-not to exceed $100.00	11/10/78
		(a) (2)-actual damages as court may allow	11/10/78
12 USC § 3909	Banks & Banking International Lending Supervision	(d) (1)-not more than $1,000 per day for each day violation continues	11/30/83
15 USC § 18a	Commerce & Trade-Monopolies; Restraints of Trade	(g) (1)-not more than $10,000 per day	9/30/76

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USC Section	Name	Civil Penalties	Date Enacted
15 USC § 21	Commerce & Trade-Monopolies; Restraints of Trade	(l)-not more than $5,000 for each violation	7/23/59
15 USC § 45	The Antitrusts Acts	(l)-not more than $5,000 for each violation	11/16/73
15 USC § 78u	Commerce & Trade-Securities Exchanges	(h) (7) (A)-(i) $100 w/o regard to volume of records (ii)-out of pocket damages	10/10/80
15 USC § 687g	Small Business Investment Act	(a)-not more than $100 for each day	8/21/58
15 USC § 719i	Alaska Natural Gas Transportation Act	(c)-not to exceed $25,000 per day	10/22/76
15 USC § 754	Emergency Petroleum Allocation Act	(3) (A) (i)-not more than $20,000 each violation	12/22/75
		(3) (A) (ii)-not more than $10,000 for each violation	12/22/75
		(3) (A) (iii) (I)-not more than $2,500.00	12/22/75
15 USC § 797	Energy Supply & Environmental Coordination Act	(b) (1)-not more than $2,500 for each violation	6/22/74
15 USC § 1398	National Traffic & Motor Vehicle Safety Act	(a)-$1,000 per violation not to exceed $800,000	9/9/66

15 USC § 1424	National Traffic & Motor Vehicle Safety Act	(b)-$1,000 per violation not to exceed $800,000	9/9/66
15 USC § 1917	Automobile Fuel Efficiency Act	(a)-not to exceed $1,000 per violation; or $800,00 per series of violations	10/20/72
15 USC § 1990b	Automobile Fuel Efficiency Act	(a)-not to exceed $1,000 per violation; or $100,000 per series of violations	10/20/72
15 USC § 2028	Automobile Fuel Efficiency Act	(a) (1) and (a) (4)-not to exceed $1,000 per violation; or $250,000 per series of violations	10/24/84
15 USC § 3414	Natural Gas Policy Act	(b) (6) (A) (ii)-not more than $250,000 per violation	11/9/78
15 USC § 4243	Sensing Commercialization Act	(a) (3)-not to exceed $10,000 per violation	7/17/84
16 USC § 470ff	Archaeological Resources Protection Act	(a) (2)-unlimited amount	10/31/79
16 USC § 972f	Eastern Pacific Tuna	(b) (3)-not to exceed $100,000 per violation	10/4/84
16 USC § 1100(a)	Conservation/Foreign Fishing Vessel In US Fisheries Act	(a)-not to exceed $1,000 per violation	10/27/72
16 USC § 1376	Marine Mammal Protection Act	(b)-not more than $25,000	10/21/72
18 USC § 1083	Crimes-Gambling (Transportation between ship & shore)	(b)-$200 for each passenger carried or transported	5/24/49

USC Section	Name	Civil Penalties	Date Enacted
19 USC § 1337	Tariff Act	(f) (2)-not more than $10,000 or the domestic value	7/26/79
19 USC § 1627a	Tariff Act	(b)-not more than $500 for each violation	10/30/84
21 USC § 134e	Food & Drugs-Animals, Meats & Dairy Products	(a) (2)-not more than $1,000	1/12/83
21 USC § 842	Food & Drugs-Drug Abuse Prevention	(c)-not more than $25,000	10/27/70
21 USC § 961	Food & Drugs-Drug Abuse Prevention	(1)-not more than $25,000	10/27/70
22 USC § 3105	International Investment Act	(a)-not to exceed $10,000	10/11/76
26 USC § 5761	Alcohol, Tobacco & Firearms-Cigars, Cigarettes, Papers	(a) not to exceed $1,000	9/2/58
26 USC § 6420	Procedure & Administration-Abatements, Credits & Refunds	(h) (1) and (2)-two times the excessive amount; or $10.00 each violation	1/14/83
26 USC § 6421	Procedure & Administration-Abatements, Credits & Refunds	(j) (2)-two times the excessive amount; or $10.00 each violation	1/14/83

26 USC § 6427	Procedure & Administration-Abatements, Credits & Refunds	(j) (1)-two times the excessive amount; or $10.00 each violation	10/17/76
26 USC § 6675	Procedure & Administration-Abatements, Credits & Refunds	(a)-two times the excessive amount; or $10.00 each violation	5/21/70
26 USC § 6677	Procedure & Administration-Abatements, Credits & Refunds	(a)-5% of trust; or maximum of $1,000.00	12/30/69
26 USC § 6679	Procedure & Administration-Abatements, Credits & Refunds	(a)-$1,000 each violation	9/3/82
26 USC § 6687	Procedure & Administration-Abatements, Credits & Refunds	(a)-$5.00 each violation	10/20/72
26 USC § 6689	Procedure & Administration-Abatements, Credits & Refunds	(a)-not to exceed 25% of deficiency	12/28/80
26 USC § 6697	Procedure & Administration-Abatements, Credits & Refunds	(a)-unlimited depending upon circumstances	10/4/76
26 USC § 6702	Procedure & Administration-Abatements, Credits & Refunds	(a) (1) (A)-$500.00 each violation	9/3/82

USC Section	Name	Civil Penalties	Date Enacted
28 USC § 1875	Protection of juror's employment	(b) (3)-not more than $1,000 for each violation	11/2/78
29 USC § 216	Fair Labor Standards	(e)-not to exceed $1000	4/8/74
29 USC § 666	Occupational Safety & Health	(a)-not to exceed $10,000 each violation	12/29/70
		(b)-not to exceed $1000 for each violation	12/29/70
		(c)-not to exceed $1000	12/29/70
		(d)-not to exceed $1000	12/29/70
		(i)-not to exceed $1000 for each violation	12/29/70
29 USC § 1059	Recordkeeping and Reporting Requirement	(b)-$10.00 each violation	9/2/74
30 USC § 942	Black Lung Benefits Act	(b)-not more than $500 for each failure	3/1/78
30 USC § 1719	Federal Oil & Gas Royalty Management Act	(a) (1) (2)-up to $500 each violation/ each day continues	1/12/83
		(b)-not more than $5000	1/12/83
		(c)-up to $10,000 per day	1/12/83
		(d)-up to $25,000 per violation for each day	1/12/83
31 USC § 3729	False Claims Act	$2,000.00, plus an amount 2 times damages & costs	9/13/82

31 USC § 5321	Money & Finance-Monetary Transactions	(a) (1)-$10,000 each	9/13/82
31 USC § 9308	Money & Finance-Sureties & Surety Bonds	at least $500.00 but not more than $5,000.00	9/13/82
33 USC § 499	Bridge Act of 1906	(c)-not more than $1,000	10/15/82
33 USC § 502	Bridge Act of 1906	(c)-not more than $1,000; each date separate violation	10/15/82
33 USC § 533	General Bridge Act of 1946	(b)-not more than $1,000; each day separate violation	10/15/82
33 USC § 930	Longshoremen's & Harbor Worker's Compensation Act	(e)-not to exceed $10,000 for each violation	3/4/27
33 USC § 1319	Federal Water Pollution Control Act or Clean Water Act	(d)-not to exceed $10,000 per day; each day separate violation	10/18/72
33 USC § 1321	Federal Water Pollution Control Act or Clean Water Act	(b) (6) (A)-not more than $5,000 for each violation	10/18/72
		(b) (6) (B)-not to exceed $50,000 except willful then penalty not to exceed $250,000; each violation separate offense	10/18/72
		(j) (2)-not more than $5,000	10/18/72
33 USC § 1322	Federal Water Pollution Control Act or Clean Water Act	(j)-not more than $2,000 per violation	10/18/72

USC Section	Name	Civil Penalties	Date Enacted
33 USC § 1344	Federal Water Pollution Control Act or Clean Water Act	(s) (5)-not to exceed $10,000 per day	10/18/72
33 USC § 1514	Deepwater Port Act	(b) (3)-not to exceed $25,000 per day	1/3/75
33 USC § 1517	Deepwater Port Act	(a) (2)-not more than $10,000 for each violation	1/3/75
33 USC § 1608	International Navigational Rules Act	(a)-not more than $5,000 for each violation	12/24/80
		(b)-not more than $5,000 for each violation	12/24/80
33 USC § 1908	Act to Prevent Pollution From Ships	(b) (1)-not more than $25,000 for each violation; each day separate violation	10/21/80
		(b) (2)-$5,000 for each offense	10/21/80
33 USC § 2072	Inland Navigational Rules Act	(a)-not more than $5,000 for each violation	12/24/80
		(b)-not more than $5,000 for each violation	12/24/80
39 USC § 3012	Postal Service Act	(a) (3)-not to exceed $10,000 per violation	11/30/83
42 USC § 300E-9	Public Health Services Act	not to exceed $10,000	12/29/73
42 USC § 300G-3	Safe Drinking Water Act	(b)-not to exceed $5,000 for each day of violation	12/16/74

42 USC § 300h-2	Safe Drinking Water Act	(b) (1)-not to exceed $5,000 for each day of violation	12/16/74
42 USC § 300h-3	Safe Drinking Water Act	(c)-not to exceed $5,000 for each day of violation	12/16/74
42 USC § 300J	Safe Drinking Water Act	(e) (2)-not more than $2,500 for each failure to comply	12/16/74
42 USC § 2114	Solid Waste Disposal Act	(b)-not to exceed $100,000 for each violation	1/4/83
42 USC § 2167	Atomic Energy Act	(a)-not to exceed $100,000 for each violation	6/30/80
42 USC § 2282	Atomic Energy Act	(a)-not to exceed $5,000 for each violation	12/24/69
42 USC § 4910	Noise Control Act	(a) (2)-not to exceed $10,000 per day per violation	10/27/72
42 USC § 5157	Disaster Relief Act	(b)-not to exceed $5,000 for each violation	5/22/74
42 USC § 5410	National Manufactured Housing Construction & Safety Standards Act	not to exceed $1,000 per violation or not to exceed $1,000,000 for any related series of violations	8/22/74
42 USC § 5846	Energy Reorganization Act	(b)-not to exceed $100,000 for each violation	10/11/74
42 USC § 6384	Energy Policy & Conservation Act	not to exceed $10,000 per violation	12/22/75
42 USC § 6395	Energy Policy & Conservation Act	not more than $5,000 per violation	12/22/75

USC Section	Name	Civil Penalties	Date Enacted
42 USC § 6928	Solid Waste Disposal Act	(a)-not to exceed $25,000 for each day of non-compliance	10/21/76
42 USC § 6934	Solid Waste Disposal Act	(e)-not to exceed $5,000 for each day of violation	10/21/80
42 USC § 6991	Solid Waste Disposal Act	(e) (a)-not to exceed $25,000 per day of non-compliance	11/8/84
		(e) (d)-not to exceed $10,000 per day per tank in violation	11/8/84
42 USC § 7218	Dept. of Energy Organization Act	(b)-not to exceed $10,000 per violation	8/4/77
42 USC § 7524	Air Pollution Control Act	not more than $10,000	8/7/77
42 USC § 7545	Air Pollution Control Act	(d)-not more than $10,000 per day of violation	12/31/70
42 USC § 7920	Uranium Mill Tailings Radiation Control Act	(a)-not more than $1,000 per day of violation	11/8/78
42 USC § 8220	National Energy Conservation Act	(d)-not to exceed $25,000 per violation	11/9/78
42 USC § 8513	Emergency Energy Conservation Act	(j) (1)-not to exceed $1,000 per violation	11/5/79
42 USC § 8512	Emergency Energy Conservation Act	(e) (1)-not to exceed $1,000 violation	11/5/79

42 USC § 8521	Emergency Energy Conservation Act	(f)-not to exceed $100.00 for each violation	11/5/79
42 USC § 9609	Comprehensive Environmental Response, Compensation & Liability Act	not to exceed $10,000 for each day of violation	12/11/80
43 USC § 1822	Outer Continental Shelf Lands Act	(a) (1)-not to exceed $10,000	9/18/78
45 USC § 39	Railroads-Safety Appliances & Equipment	not more than $100.00 for each day of violation	1/3/75
46 USC § 319	Shipping/Vessels in Domestic Commerce	$500.00 for each violation	12/24/80
46 USC § 420	Shipping/Inspection of Steam Vessels	(f)-not to exceed $1,000.00	9/10/76
46 USC § 815	Shipping Act	not to exceed $25,000	6/19/79
46 USC § 817 (e) (b) (6)	Shipping Act	not to exceed $1,000 for each day of violation	8/29/72
46 USC § 820	Shipping Act	(b)-not to exceed $5,000 for each day of violation	6/19/79
46 USC § 831	Shipping Act	(a)-not to exceed $5,000 for each violation	6/19/79
46 USC § 844	Intercoastal Shipping Act	not to exceed $1,000 for each day of violation	8/29/72
46 USC § 1122a	Merchant Marine Act	$50.00 per day for each day of violation	8/6/81

USC Section	Name	Civil Penalties	Date Enacted
46 USC § 1712	Shipping Act of 1984	(a)-not to exceed $50,000 for each violation	3/20/84
46 USC § 1714	Shipping Act of 1984	(b)-not to exceed $5,000 for each day of violation	3/20/84
46 USC § 2302	Shipping/Operation of Vessels	(a)-not more than $1,000 per violation	
		(b)-not more than $5,000 per violation	
		(c)-not more than $1,000 per violation	8/26/83
46 USC § 2306	Shipping/General	(a) (4)-not more than $5,000 per day of violation	
		(b) (2)-not more than $1,000 per day of violation	10/19/84
46 USC § 3102	Shipping-Inspection General	(c) (2)-not more than $25,000	10/30/84
46 USC § 3318	Marine Safety Act	(a)-not more than $5,000	8/26/83
		(g)-not more than $5,000	8/26/83
		(h)-not more than $1,000	8/26/83
		(i)-not more than $1,000	8/26/83
		(j) (1)-not more than $10,000 for each day in violation	8/26/83
		(k)-not more than $10,000 for each day in violation	8/26/83
		(l)-not more than $5,000 for each day in violation	8/26/83
46 USC § 3502	Shipping/Carriage of Passengers	(e)-not to exceed $100.00 for each violations	8/26/83
46 USC § 3504	Shipping/Carriage of Passengers	not more than $10,000 and $500.00 for each ticket sold	8/26/83
46 USC § 3506	Shipping/Carriage of Passengers	not to exceed $200.00	8/26/83
46 USC § 3718	Shipping/Dangerous Liquid Cargoes	(a) (1)-not to exceed $25,000 per day of violation	8/26/83
46 USC § 4106	Shipping/Uninspected Vessels	not to exceed $100.00	8/26/83
46 USC § 4311	Shipping/Recreational Vessels	(b)-not to exceed $100,000 for related series of violations	8/26/83
		(c)-not to exceed $1,000 per violation	8/26/83
46 USC § 4504	Shipping/Fish Processing Vessels	not to exceed $1,000 per violation	7/17/84
46 USC § 6103	Shipping/Casualty Investigations	not to exceed $1,000 per violation	8/26/83
46 USC § 8101	Shipping/General	(e)-$50.00 for each deficiency	8/26/83
		(f)-$100.00 for each deficiency	8/26/83
		(h)-not to exceed $1,000	8/26/83

USC Section	Name	Civil Penalties	Date Enacted
46 USC § 8102	Shipping/General	(a)-not to exceed $1,000	8/26/83
46 USC § 8103	Shipping/General	(f)-$500.00 per person employed in violation of Act	8/26/83
46 USC § 8104	Shipping/General	(i)-$100.00 each violation	8/26/83
		(j)-$500.00 each violation	8/26/83
46 USC § 8302	Shipping/Masters & Officers	(e)-$100.00 each violation	8/26/83
46 USC § 8304	Shipping/Pilots	(d)-$100.00 each violation	8/26/83
46 USC § 8502	Shipping/Pilots	(e)-$500.00 each violation	8/26/83
46 USC § 8503	Shipping Pilots	(d)-not more than $25,000 per violation	10/30/84
46 USC § 8701	Shipping/Unlicensed Personnel	(d)-$500.00 each violation	8/26/83
46 USC § 8702	Shipping/Unlicensed Personnel	(e)-$500.00 each violation	8/26/83
46 USC § 8906	Shipping/Tank Vessels	$1,000 each violation	8/26/83
46 USC § 9308	Shipping/Great Lakes	(a)-$500.00 for each day of violation	8/26/83
		(b)-$500.00 for each day of violation	8/26/83
		(c)-$500.00 each violation	8/26/83

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46 USC § 10307	Shipping/Foreign & Intercoastal	$100.00 each violation	8/26/83
46 USC § 10308	Shipping/Foreign & Intercoastal	$100.00 each violation	8/26/83
46 USC § 10309	Shipping/Foreign & Intercoastal	(b)-$200.00 for each report not made	8/26/83
46 USC § 10310	Shipping/Foreign & Intercoastal	$50.00 each violation	8/26/83
46 USC § 10312	Shipping/Foreign & Intercoastal	(c)-$100.00 each violation	8/26/83
46 USC § 10314	Shipping/Foreign & Intercoastal	(a) (2)-not to exceed $500.00	8/26/83
		(b)-not to exceed $500.00	8/26/83
46 USC § 10315	Shipping/Foreign & Intercoastal	(c)-not more than $500.00 per violation	8/26/83
46 USC § 10321	Shipping/Foreign & Intercoastal	$200.00 each seaman carried violation	8/26/83
46 USC § 10505	Shipping/Coastwise Voyages	(a) (2)-not to exceed $100.00	8/26/83
		(b)-not to exceed $500.00	8/26/83
46 USC § 10508	Shipping/Coastwise Voyages	$20.00 each violation	8/26/83
46 USC § 10711	Shipping/Unseaworthiness	3 times value of seaman's money, property & wages involved	8/26/83
46 USC § 10902	Shipping/Unseaworthiness	(a) (2)-$500.00 each violation	8/26/83
		(b) (4)-$100.00 each violation	8/26/83

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USC Section	Name	Civil Penalties	Date Enacted
46 USC § 10903	Shipping/Unseaworthiness	(d)-$100.00 each violation	8/26/83
46 USC § 10907	Shipping/Unseaworthiness	(b)-$500.00 each violation	8/26/83
46 USC § 11101	Shipping/Protection & Relief	(f)-no less than $50.00 but no more than $500.00	8/26/83
46 USC § 11102	Shipping/Protection & Relief	(b)-$500.00 each violation	8/26/83
46 USC § 11104	Shipping/Protection & Relief	(b)-$100.00 each violation	8/26/83
46 USC § 11105	Shipping/Protection & Relief	(C)-$500.00 each violation	8/26/83
46 USC § 11303	Shipping/Offenses & Penalties	(a)-$200.00 each violation	8/26/83
		(b)-$200.00 each violation	8/26/83
		(c)-$150.00 each violation	8/26/83
46 USC § 11505	Shipping/Offenses & Penalties	2 times the amount owed the Secretary	8/26/83
46 USC § 11506	Shipping/Offenses & Penalties	$50.00 each violation	8/26/83
46 USC § 12122	Shipping/Documentation	(a)-not more than $500.00 each violation	8/26/83
46 USC § 12309	Shipping/Recreational Boating Safety	(b)-not more than $1,000	8/26/83
		(c)-not more than $200.00	8/26/83
49 USC § 10527	Interstate Commerce-Jurisdiction	(b)-not more than $10,000 each violation	7/1/80
49 USC § 10529	Interstate Commerce-Jurisdiction	(d) (1)-$500 for each violation not more than $250 for each additional day	7/1/80
49 USC § 11901	Interstate Commerce Act	(a)-$5,000 each violation; each day a separate violation	10/17/78
		(b)-$500.00 each violation and $25.00 each day violation continues	10/17/78
		$25.00 each day continues	10/17/78
		(c)-$500 each violation	10/17/78
		(d)-not more than $5,000	10/17/78
		(e) (1)-at least $100.00 & not more than $500; $50.00 each day violation continues	10/17/78
		(e) (2)-$100.00 each violation	10/17/78
		(f) (1)-$500.00 each violation	10/17/78
		(f) (2)-$100.00 each violation	10/17/78
		(f) (3)-$100.00 each violation	10/17/78
		(g)-not more than $500.00 each violation and $250.00 each day violation continues	10/17/78
		(h)-not to exceed $20,000 each violation	10/17/78
		(i) (1)-$500 each violation; not more than $250 each day violation continues	10/17/78
		(j) (1)-not to exceed violation; not more than $500 each day violation continues	10/17/78

USC Section	Name	Civil Penalties	Date Enacted
		(j) (2) (b)-not more than $1,000; not more than $500 each day violation continues	10/17/78
		(j) (3)-not more than $500 each violation $250 each day violation continues	10/17/78
		(k)-$2,000 each violation; not more than $5,000 for each subsequent violation	10/17/78
49 USC § 11902	Interstate Commerce Act	3 times the value involved	10/17/78
49 USC § 11902a	Interstate Commerce Act	(a)-not more than $10,000 for each violation	7/1/80
		(b)-not more than $10,000	7/1/80
50 USC § 1705	Emergency Economic Powers Act	not to exceed $10,000 for each violation	12/28/77
50 USC § 2410 (app.)	Export Administration Act	(c) (1)-not to exceed $10,000 per violation	9/29/79

No. 85-1259 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD LUNN TULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees an alleged violator of the Clean Water Act and Rivers and Harbors Act a right to a jury trial in an action brought by the United States seeking injunctive relief, restoration of filled wetlands, and civil penalties.

2. Whether the court of appeals properly found no basis for applying equitable estoppel to prevent enforcement of the Clean Water Act and Rivers and Harbors Act.

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EDWARD LUNN TULL, PETITIONER

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the district court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610.

JURISDICTION

The decision of the court of appeals was issued on July 30, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 26a-27a), and November 4, 1985 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Judgment was entered against petitioner by the United States District Court for the Eastern District of Virginia (Pet. App. 30a-66a) for violating the Clean Water Act,

33 U.S.C. (& Supp. II) 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.*, by his filling activity at four locations on the island of Chincoteague, Virginia, without the requisite permits. The court of appeals (Pet. App. 1a-25a) affirmed.

1. Petitioner is a longtime resident of Chincoteague, engaged in the business of filling and developing residential resort properties on the island (Pet. App. 32a). Beginning in 1975, he filled approximately 12.5 acres of wetlands in developing four of these properties (see *id.* at 4a). Thereafter, the United States filed a complaint, charging him with violation of the Clean Water Act, and, under the amended complaint, violation of the Rivers and Harbors Act as well (*id.* at 30a, 67a-74a).[1] The complaint alleged that petitioner had discharged pollutants into waters of the United States without a permit from the Army Corps of Engineers, in violation of 33 U.S.C. 403, 1311(a) and 33 U.S.C. (& Supp. II) 1344. The United States sought an order enjoining petitioner from committing further violations, directing removal of fill and restoration of affected areas, assessing civil penalties in the amount of $10,000 per day of violation, awarding the government's costs in the action, and granting such other relief deemed just and proper by the court (Pet. App. 72a).

The district court denied petitioner's request for a jury trial (see Pet. 4). At a 15-day bench trial, petitioner did not contest that he filled the properties in question, nor did he

[1]Unauthorized filling of navigable waters of the United States is prohibited by Section 301 of the Clean Water Act, 33 U.S.C. 1311, and Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403. Section 309 of the Clean Water Act, 33 U.S.C. 1319, provides for initiation of a civil action for appropriate relief against any person in violation of Section 301. Appropriate relief may include a permanent or temporary injunction (33 U.S.C. 1319(b)) and civil penalties not to exceed $10,000 per day of violation (§ 1319(d)).

claim that he had ever applied for a permit to fill from the Corps of Engineers (Pet. App. 4a). He argued instead that the properties he filled were not wetlands and that the waters at issue were not navigable and therefore he did not need any permits, that the United States should be estopped from claiming he needed such a permit, and that the Clean Water Act and Rivers and Harbors Act and the government's regulations thereunder were unconstitutional as applied to him (*ibid.*).

2. The district court found that petitioner had filled portions of all four properties that were wetlands or navigable waters (Pet. App. 32a-50a). The court found no merit in petitioner's contentions that the statutes and regulations relied upon by the government were unconstitutional either as a taking of his property or as unconstitutionally vague (*id.* at 54a-55a). It also rejected petitioner's claim that the government should be equitably estopped from challenging his filling activities (*id.* at 55a-58a). The court found this contention to be "without foundation" since "the agents of the United States government did not mislead [petitioner]" (*id.* at 56a). The court stated that "perhaps" a showing of affirmative conduct by the government would warrant a departure from the general rule that equitable estoppel does not lie against the government, but found that "[t]he evidence here failed to disclose any statements or conduct of an affirmative nature" which could have misled petitioner, and that it was not "shown that any silence or inaction by the government was purposefully designed to mislead or confuse [petitioner]" (*id.* at 57a). The district court also pointed out that the other enforcement actions pending against petitioner at the time[2] made him "well aware of the necessity

[2]Earlier in its opinion (Pet. App. 35a-36a), the district court also discussed a preliminary injunction it had issued in this action regarding petitioner's filling activities.

for applying for permits" (*id.* at 58a), and that "[petitioner's] activities appear to this Court to have been a deliberate attempt at evasion and misdirection by [petitioner]. Such actions would never support a claim for an estoppel even were the government not involved" (*ibid.*).

For his violations, petitioner was fined $75,000 for various fillings (Pet. App. 60a); ordered to remove the fill in one instance and restore those lots to wetlands (*id.* at 61a), to restore two other lots to wetlands so as "not to punish" third parties (*id.* at 61a-62a), and to restore another area as well (*id.* at 62a); and was ordered to engage in no further filling activities without applying for a permit from the Corps of Engineers (*ibid.*). The penalty for the filling of another area was established by the district court in the alternative: petitioner could either pay a fine of $250,000 or "restore [it] * * * to its former navigable condition" (*id.* at 61a).

3. In affirming, the court of appeals rejected petitioner's claim that he had been erroneously denied his constitutional right to a trial by jury (Pet. App. 8a-10a). The court reasoned that penalties were assessed here pursuant to equitable powers, and also noted that it is an open question whether the Seventh Amendment applies to government litigation at all. The court also rejected petitioner's claim that the government's enforcement action should be barred by equitable estoppel (*id.* at 10a-11a). It discussed in some detail the ample support for the district court's conclusion that petitioner had in fact not been misled, and stated that it therefore "need not reach the issue whether misleading by silence or inaction, the most [petitioner] alleges here, could ever justify invoking the equitable estoppel doctrine against the government" (*id.* at 10a (citations omitted)). District Judge Warriner dissented on these two issues, and would

have reversed the district court (*id.* at 13a-25a).[3] The court of appeals denied rehearing en banc by a divided vote (*id.* at 26a-29a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The first question presented in this case is closely related to the first question presented in *M.C.C. of Florida, Inc.* v. *United States,* No. 85-1292 (petition for cert. pending).[4] In both cases, petitioners have claimed entitlement to a jury trial in actions brought by the United States to enforce the Clean Water Act and Rivers and Harbors Act. Relying in part on the court of appeals' decision in this case, the Eleventh Circuit held in *M.C.C.* that, because the issues raised under both statutes "were equitable in nature," "M.C.C. was not entitled to a jury trial." *United States* v. *M.C.C. of Florida, Inc.,* 772 F.2d 1501, 1507 (11th Cir. 1985) (footnote omitted). Both decisions are entirely correct, and there are no court of appeals or district court decisions to the contrary.[5]

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[3]The court of appeals also rejected petitioner's remaining constitutional claims (Pet. App. 6a-8a) and contention that one waterway involved was not navigable (*id.* at 12a); the court did "not think that [petitioner's] other contentions [regarding, inter alia, laches, collateral estoppel, challenges to the district court's statutory authority to levy a civil fine and its conduct of a view of the disputed area, and assertions that the Takings Clause and delegation doctrine had been violated] merit discussion" (*ibid.*).

[4]Petitioners in each case will be sent both briefs in opposition.

[5]The district courts that have considered the issue have also held that there is no right to a jury trial in a Clean Water Act enforcement action. See, *e.g., United States* v. *Atlantic Richfield Co.,* 429 F. Supp. 830, 839-840 n.13 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.,* 573 F.2d 1303 (3d Cir. 1978) (Table) (33 U.S.C. 1321); *United States* v. *Lambert,* 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983) (33 U.S.C. 1319).

The right to jury trial in civil actions is set forth in the Seventh Amendment to the Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." This right applies to actions in which legal, as opposed to equitable, rights are to be ascertained. *Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446-447 (1830).[6]

The court of appeals correctly held that there was no constitutional right to a jury trial in this civil enforcement action under the Rivers and Harbors Act or Clean Water Act. Regarding liability,[7] petitioner did not contest that he filled the areas at issue or that he failed to obtain a permit (see pages 2-3, *supra*). Instead, the trial was devoted principally to petitioner's contention that the properties he filled were not wetlands or navigable waters. This issue, being "primarily one of regulatory and statutory interpretation" (*United States* v. *Riverside Bayview Homes, Inc.,* No. 84-701 (Dec. 4, 1985), slip op. 4)), is clearly for resolution by the court.[8]

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[6]The lack of any legal (rather than equitable) issue in the present case makes it unnecessary to resolve whether there is a civil jury trial right at all in a case with the government. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 449-450 n.6 (1977); Pet. App. 9a.

[7]It is not entirely clear whether petitioner wanted a jury to determine damages, liability, or both. While the former seems most likely (see Pet. 6-7, 16), we will discuss briefly the appropriateness of a jury determination of liability as well.

[8]In fact, if petitioner had applied for a permit before filling his property as the Clean Water Act requires, the agency would have determined in the first instance the extent of wetlands on petitioner's property. Review of the agency's decision in the district court would then have been pursuant to the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See *Avoyelles Sportsmen's League, Inc.* v. *Marsh,* 715 F.2d 897, 905 (5th Cir. 1983) (collecting cases).

Nor did the remedy in this case give rise to a jury issue. Contrary to petitioner's characterization of the relief sought by the United States as "in the nature of an action in debt" (Pet. 15),[9] it is clear that the remedies requested, and the actual remedial order entered by the district court, are solely equitable in nature. As this Court held in *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 316 (1982), a district court in a Clean Water Act proceeding is called upon to exercise its "traditional equitable discretion in enforcing the statute." Such discretion should result in an order "that will achieve *compliance* with the Act" (*id.* at 318 (emphasis in original)). In particular, the civil penalties, upon which petitioner especially relies, are no less equitable in nature than the other relief ordered. As the EPA repeatedly has made clear, the purpose of civil penalties under the statutes at issue in this case is "deter[ring] people from violating the law," "fair and equitable treatment of the regulated community," and "swift resolution of environmental problems."[10] These are therefore equitable, not legal, remedies. The court of appeals accordingly was correct in holding that the district court was called upon "to exercise statutorily conferred equitable power in determining the amount of the fine" (Pet. App. 9a). Finally, the discretion afforded the court in setting civil penalties under these statutes is too

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[9]As this Court has stated, "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty." *Stockwell* v. *United States,* 80 U.S. (13 Wall.) 531, 542 (1871). Here, the amount due is highly discretionary. See also Note, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment,* 83 Mich. L. Rev. 1950, 1960 (1985).

[10]See EPA Memorandum 2-4 (Feb. 16, 1984), *reprinted in* [Federal Laws] Env't Rep. (BNA) 41:2991-41:2993; cited in *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.,* 611 F. Supp. 1543, 1556-1565 (E.D. Va. 1985); see also EPA Memorandum (Feb. 11, 1986) (summarized in [Current Developments] Env't Rep. (BNA) 16:1974 (Feb. 21, 1986)).

great for them to be properly characterized as "legal" remedies. See generally Note, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 Mich. L. Rev. 1950, 1963 (1985) (collecting authorities).[11]

Moreover, despite petitioner's claims (Pet. 14-16), the penalty in this case does not stand alone, but rather is part of an overall remedial plan which included mitigation, restoration, and injunctive relief. As the court of appeals explained (Pet. App. 9a-10a (footnote omitted)):

> Here the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence.

Except with respect to civil penalties, petitioner does not argue that the remedy ordered here should have been one for a jury to formulate. And particularly where the penalties determination is made as part of a remedial " 'package' " which includes traditional equitable remedies, it is all the more clearly a matter involving the exercise of equitable judicial discretion.

Indeed, there was no function for a jury to perform in this case. Petitioner's filling of the wetlands and failure to obtain a permit were conceded. The district court had to resolve his jurisdictional argument and, when it did, it was established

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[11]Although petitioner relies (Pet. 12-13) on *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), that decision expressly commits determination of the amount of civil penalties "to the informed discretion of the district judge" (*id.* at 438 (citation and footnote omitted)), and thus contradicts his argument that a jury must make that determination.

that he had violated the Clean Water Act and Rivers and Harbors Act. The fashioning of an appropriate remedy was clearly a function for the district court as well. Nor has petitioner argued that a jury should have decided the issue of estoppel, which is plainly an equitable, not legal, defense. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984).[12]

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[12]As the court of appeals noted (Pet. App. 10a), its holding is supported by *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (citations omitted), which held that the Seventh Amendment has "no application to cases where recovery of money damages is an incident to equitable relief." *A fortiori*, the Seventh Amendment has no application here, when the civil penalties incident to other equitable relief are not even damages. Contrary to petitioner's suggestion (Pet. 7-11), we find no indication in this Court's subsequent decisions calling this alternative holding in *Jones & Laughlin* into question. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 453 n.10 (1977). Certainly nothing in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), does so. As petitioner acknowledges (Pet. 8), that case did not address the jury trial issue, and involved instead the equitable jurisdiction of a district court under the terms of another federal statute; as petitioner also seems to acknowledge (Pet. 9-10), this Court's decision in *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (citing, inter alia, *Warner Holding Co.*), does not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief" for Seventh Amendment purposes. This Court's decisions protecting a litigant's Seventh Amendment right in cases involving a mixture of legal and equitable issues (see Pet. 8-10) are, of course, inapposite to a case like this, where, as we have shown, there is nothing for the jury to determine.

Nor, contrary to Pet. 12-13, does the decision of the court of appeals conflict with *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974). That case involved assessment of civil penalties for violation of orders issued by the Federal Trade Commission pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*). This entirely different statutory scheme provided that the sole civil remedy for a subsequent violation of an order of the Commission—where the party had not contested it in the court of appeals—was through a penalty action (498 F.2d at 425). Here, of course, a civil penalty is only one part of a package of remedies a district court may utilize. Moreover, the court in *J.B. Williams* made clear that a jury trial would only be available "not, of course, as to the validity of the order [issued by the

2. Nor, contrary to petitioner's other contention (Pet. 18-21), is this case at all suitable for considering whether equitable estoppel can ever run against the government. Both the district court (Pet. App. 55a-58a) and the court of appeals (Pet. App. 10a-12a) found emphatically that the Corps did not mislead petitioner by its silence or inaction (see pages 3-4, *supra*), and this Court "has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982), citing, inter alia, *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967)). Thus, petitioner's case is at least as "factually flawed" (Pet. 19) as the other cases he discusses and is an inappropriate vehicle for deciding his second question presented.

Moreover, this Court made clear in *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-66 (1984), that, at all events, the government cannot be estopped on the same terms as a private litigant. This is

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FTC] but as to the fact of violation" (*id.* at 426). As discussed, pages 2-3, *supra*, the trial in this case was devoted principally to petitioner's legal challenge to the Corps' exercise of jurisdiction over his wetlands property; once petitioner lost on that issue, it could no longer be said here that "the fact of [petitioner's] violation was fairly disputed" (498 F.2d at 428, 430). Instead, all that remained to be determined was the appropriate relief to be granted by the court, including the amount of any civil penalties which might be assessed and, as the court in *J.B. Williams* said (*id.* at 438 (citation and footnote omitted)), "[T]he amount of penalties within the maximum is committed to the informed discretion of the district judge." Thus, *J.B. Williams* does not present a conflict with the court of appeals' decision here. Nor are the other court of appeals decisions cited at Pet. 12 in conflict: *FAA* v. *Landy*, 705 F.2d 624, 635 (2d Cir.) (right to jury trial not discussed), cert. denied, 464 U.S. 895 (1983); *United States* v. *New Mexico*, 642 F.2d 397, 402 (10th Cir. 1981) (court held tax recovery action to have historically given right to jury trial, and that "pivotal issue of fact" was disputed); *Quinn* v. *DiGiulian*, 739 F.2d 637, 645-647 (D.C. Cir. 1984) (compensatory and punitive damages awarded in "new cause of action sounding in tort" (see *Curtis* v. *Loether*, 415 U.S. at 196)).

so because of the interest of all citizens in enforcement of the law. A party, then, has a heavy burden in asserting that the law should not be enforced against him because of conduct by government agents; he must make "at least [a] demonstrat[ion] that the traditional elements of an estoppel are present" (*id.* at 61). These elements include a showing "that reliance [was] reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading" (*id.* at 59 (footnote and citation omitted)). Petitioner's justification for his "reliance" reduces to an assertion that, unless he was told otherwise by government officials, he was entitled to continue to fill his properties without regard to the permit requirements of the Clean Water Act. Such a self-serving argument does not meet the standards of this Court's decision in *Community Health Services*. Moreover, *Community Health Services* indicated that a sophisticated actor has "a duty to familiarize itself with the legal requirements" of its actions (*id.* at 64) and that the reasonableness of its reliance "is further undermined [if] * * * the advice it received * * * was oral" (*id.* at 65). Finally, if estoppel is ever appropriate, it would be only in an extreme case of "affirmative misconduct"—not mere nonaction—by the government. See *INS* v. *Miranda*, 459 U.S. 14, 17-19 (1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973) (per curiam); see also *Montana* v. *Kennedy*, 366 U.S. 308, 315 (1961). Each of these factors argues against review of the present case.[13]

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[13]In light of the fact that both courts below found that petitioner was not misled and the fact that, even if estoppel could sometimes be invoked against the government, it could not be here, there is no need to hold this petition pending decision in *Lyng* v. *Payne*, cert. granted, No. 84-1948 (Oct. 7, 1985). Compare Pet. 21 n.30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1986

DOJ-1986-05

(3)

No. 85-1259

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

1. Whether the defendant in a Government-instituted civil action in a Federal District Court to recover substantial civil penalties (in this case in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

2. (a) Whether equitable estoppel runs against the Government.

(b) Whether equitable estoppel precludes the recovery of civil penalties by the Government under the Clean Water Act when a citizen requests a jurisdictional inspection by the agency charged with enforcement, is led to believe that the agency does not have jurisdiction and that a permit is not required, proceeds with his development of lots under constant surveillance by the agency, is never advised that his activities have come under the agency's jurisdiction or are otherwise unlawful notwithstanding regulations requiring the agency to so inform the citizen, and is then punished five years later after virtually all of the lots have been sold to others.*

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* While we note with grave concern the treatment the petitioner has received at the hands of his government, we are constrained by our policy to address only the deprivation of the Seventh Amendment right to trial by jury.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1259

EDWARD LUNN TULL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION

INTERESTS OF AMICUS CURIAE

Amicus curiae is a non-profit membership organization dedicated to the advancement of the legal profession and the protection of the legal rights of all citizens of the Commonwealth of Virginia. The more than 2,600 members of the Virginia Trial Lawyers Association regularly participate in trials in state and federal courts. Individually and collectively amicus curiae is concerned for and intimately involved in the protection of litigants' constitutional rights, including their right to trial by jury. The Association is compelled to speak out in this case which has resulted in the denial of the right to trial

by jury to petitioner, a citizen of our state, by a Federal District Court sitting in our state.

Members of amicus curiae and the citizens they have represented in the past, those they currently represent, and those they will represent in the future have a substantial interest in the preservation of the right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States. They will be adversely affected by a judicial decision which removes from this guarantee bestowed upon us by our forefathers the right of a citizen to be tried by a jury of his peers when government seeks to impose substantial civil penalties for the violation of a statute. The civil penalty provisions of the statute applicable in this case, and similar statutes of recent origin, can produce an end result just as devastating to the litigant as prosecution under the criminal penalty provisions.[1] It makes little difference that the citizen cannot be deprived of his liberty, when his government can destroy him economically and, as a result, he loses all of his worldly possessions.

INTRODUCTORY STATEMENT

The Seventh Amendment to the Constitution of the United States guarantees the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars. The Court of Appeals in a two to one decision held that petitioner did not have a Seventh Amendment right to trial by jury in this case in which civil penalties in the amount of $325,000.00 were imposed by the District Court.[2] (Pet. App. 8a) Judge

[1] Petitioner cites to approximately 195 federal statutes enacted since October 18, 1972 which permit the government to seek civil penalties in the courts (Pet. 16 and Pet. App. 82a-100a).

[2] We have accepted petitioner's explanation that because he cannot restore the ditch to its original condition, having sold the property to others prior to any government action, his civil penalty will be $325,000.00 and not $75,000.00. (Pet. 7 note 9)

Warriner, dissenting, would have held the Seventh Amendment applicable and a jury trial required. (Pet. App. 19a-25a) Regrettably, the majority decision was not examined by the full court. The Petition For Re-Hearing *En Banc* was denied by a six to five vote. (Pet. App. 26a) It would be even more regrettable if this Court should decline to grant Certiorari to determine this important constitutional issue in view of the obvious lack of unanimity in this court below. Amicus curiae submits that an issue of such fundamental constitutional importance requires the attention of this Court.

REASONS FOR GRANTING THE PETITION

The Petition of Edward Lunn Tull should be granted because the decision of the court below frustrates the clear intent of the Seventh Amendment to the Constitution of the United States and several prior decisions of this Court. Of more immediate consequence, the decision is in direct conflict with the decisions of other Circuits, and will severely hamper the ability of trial lawyers to properly advise and represent their clients when confronted with the issue of the right to trial by jury in cases involving civil penalties. While these grounds are amply explained in the petition, amicus curiae submits this brief to amplify several points, primarily the impact of the Court of Appeals decision on the members of amicus and the citizens of the Commonwealth of Virginia whose interests it represents.

Unless this Court grants certiorari and resolves the conflict in the Circuits which this case creates, the trial bar and trial courts will be thrown into confusion and chaos. The "law of the circuit doctrine" will require a jury trial in civil penalty cases in some Circuits while requiring its denial in others. Under the holding of the instant case, jury trials will be denied in the Fourth Circuit and in the Eleventh Circuit which relied upon

the holding in this case.[3] Federal Courts in the Second Circuit and Ninth Circuit will be required to provide a trial by jury in civil penalty cases.[4] In the Circuits that have yet to opt for their particular constitutional interpretation, there will be no certainty under the law. Trial judges, trial lawyers and litigants will be forced to rely upon the time-consuming and expensive processes of appeal to formulate the rule on this issue in each Circuit. The legal quagmire that is likely to result can be avoided by this Court's resolution of the issue.

We believe that the majority of the Court of Appeals has erroneously interpreted prior decisions of this Court. The majority of the panel in the court below held that petitioner was not entitled to a jury trial because this Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), left open the question of whether the Seventh Amendment has any application at all to government litigation. *Id.* at 449 n.6 (Pet. App. 9a). Even assuming that the Seventh Amendment applies to government litigation, the majority held that the trial court was exercising statutorily conferred equitable power and that the assessment of civil penalties intertwines with the imposition of traditional equitable relief. (Pet. App. 9a).

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[3] *United States v. MCC of Florida, Inc.*, 772 F.2d 1501 (11 Cir. 1985) (no right of jury trial when damages and civil penalties are sought under the Clean Water Act). Petition for Certiorari filed January 30, 1986, No. 85-1202.

[4] *United States v. J.B. Williams Co.*, 498 F.2d 414 (2nd Cir. 1974) (jury trial required when government seeks civil penalty and statute is silent as to the right of jury trial); *FAA v. Landy*, 705 F.2d 624 (2nd Cir.), cert. denied, 464 U.S. 895 (1983) (civil fine not to exceed $1,000 for each violation under the Federal Aviation Act 49 U.S.C. § 4171(a)(1), trial by a jury); *Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945) (appellants could have demanded a jury trial when statutory penalty imposed even if they waived jury trial on issue of damages).

The majority's reliance upon a question left open by this Court when denying petitioner's right to a jury trial, of itself, should be sufficient reason for this Court to grant certiorari. The majority's reliance upon precedent which established at most the limited proposition that Congress may vest in an administrative agency the right to find facts and assess a penalty without violating the Seventh Amendment disregards the facts of this case, and is clearly erroneous. In *Atlas Roofing Co.*, this Court held that the Seventh Amendment does not "prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." 430 U.S. at 450. In *Curtis v. Loether*, 415 U.S. 189, 194 (1974), this Court made it clear that its prior decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), simply meant that the Seventh Amendment is generally inapplicable to administrative proceedings. The facts of the instant case do not support the majority's application of the law. Suit was initiated against petitioner in the District Court, not in an administrative agency (Pet. App. 67a-74a). Congress did not provide for factfinding to be done or civil penalties to be assessed by an administrative agency. To the contrary, Congress required in 33 U.S.C. § 1319(b) that suits under the Clean Water Act be brought in the District Courts. (Pet. App. 76a-77a) The District Court, not an administrative agency, imposed the $325,000.00 civil penalty against petitioner. This Court made it clear in *Atlas Roofing Co.* that under facts similar to those here, a jury is required.[5] 430 U.S. at 460.

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[5] "That case indicates, as had *Hepner v. United States*, 213 U.S. 103, 53 L.Ed. 720, 29 S.Ct. 474 (1909), *that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary in which event Jury Trial would be required*, see also *United States v. Regan*, 232 U.S. 37, 58 L.Ed. 494, 34 S.Ct. 213 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials." *Atlas Roofing Co.*, 430 U.S. at 460 (emphasis supplied).

To the extent that the majority of the court below analogized the civil penalty imposed in this case to "traditional equitable relief" or a "package" of remedies permitting the jury trial right to be circumvented (Pet. App. 9a-10a) it is clearly wrong. No authority can be found that the imposition of a civil penalty in the amount of $325,000.00 is equitable relief.[6] To the contrary, prior decisions of this Court and other courts leave little doubt that civil penalties are not equitable relief but are legal relief.[7]

Even the District Court recognized that it was sitting both in equity and law (Pet. App. 59a). A civil penalty of such a substantial amount is most closely analogous to punitive damages in a civil case. This Court in *Curtis v. Loether*, 415 U.S. at 195, required a jury trial when punitive damages were awarded.[8] The District Court in this case made it clear that it intended the civil penalty to be punitive (Pet. App. 61a).

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[6] The failure to cite authority for this proposition in the opinion of the majority of the Court below is significant. (Pet. App. 10a) We believe that no authority is cited because it simply does not exist. Perhaps the majority below mistakenly believed that the District Court was providing restitution. However, restitution is not the same as a civil penalty. See *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

[7] *Hepner v. United States*, 213 U.S. 103 (1909) (dictum); *United States v. Regan*, 232 U.S. 37 (1914) (dictum); *Porter v. Warner Holding Co., supra* (dictum); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, supra* (dictum); *United States v. J.B. Williams Co., supra; Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945); J. Moore, J. Lucas and J. Wiches, *Moore's Federal Practice* paragraph 38. 31[1] (2d ed. 1985), pp. 38-235, 236.

[8] "As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." *Curtis v. Loether*, 415 U.S. at 195-196.

Historically, courts of equity had jurisdiction only to address those cases for which no legal cause of action was available. This Court has held that the equity jurisdiction of the federal courts is limited to those equitable causes of action existing when the Constitution was enacted. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). However, the Seventh Amendment applies to actions unknown at the time that the Amendment was adopted and applies to new legal rights and legal remedies created if they are in the nature of actions triable under the common law, *i.e.*, in contradistinction to equitable rights. *Curtis v. Loether*, 415 U.S. at 193. Accordingly, it is actions in equity which are limited at the time of the Amendment, and not common law actions. The majority opinion failed to appreciate this distinction and properly recognize that a civil penalty is a legal rather than an equitable remedy (Pet. App. 8a).

To the extent that the majority of the court below would deny a jury trial because the civil penalty provision "intertwines with the imposition of traditional equitable relief," the majority is simply wrong. The statute itself in 33 U.S.C. § 1319(b) makes a specific distinction between the equitable relief permitted and the civil penalty provisions found in 33 U.S.C. § 1319(d). Nothing in the legislative history supports a holding that the civil penalty provisions found in the statute are to be construed as "traditional equitable relief," nor is there any legislative history that would imply that a jury trial is to be denied when the government seeks civil penalties under the Clean Water Act. Absent any such clear direction from Congress, the courts are required to analogize the new legal duty and remedy sought to those "typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. at 195. This Court has by clear implication left no doubt that civil penalties are not equitable in nature, are readily distinguishable from restitution, and therefore require a trial by jury. *Porter v. Warner*

Holding Co., 328 U.S. at 402. To the extent that the decision of the majority of the court below may be read to deny a jury trial when equitable and legal relief in the form of civil penalties are mixed, it would be diametrically opposed to this Court's prior decisions.[9]

We note with concern petitioner's analysis of the proliferation of recently enacted federal statutes which provide for the imposition of civil penalties in the federal courts (Pet. App. 82a-100a). Even without such a substantial increase in the number of statutes providing for civil penalties, the sheer magnitude of the penalty imposed in this case is, we believe, sufficient to invoke the Seventh Amendment's protection. As pointed out by Judge Warriner in his dissent, "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation" (Pet. App. 25a). It is reasonable to assume that if petitioner could choose between a civil penalty of $325,000.00 or six months and one day in jail, his choice would be jail. Each day in jail would be worth $1,795.58. No one would seriously argue that the Sixth Amendment would not entitle petitioner to a jury trial if he were imprisoned for more than six months for the violation. *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). Is it not then an incredible argument that he can be denied a jury trial when the imposition of a civil penalty could ruin him financially for the rest of his life but could not be denied trial by jury if his punishment were to spend six months and one day in jail?

In the instant case petitioner found himself at odds with the overwhelming power of a government that sought "civil penalties" that could have totalled more

[9] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Ross v. Bernhard*, 396 U.S. 531 (1970).

than 22 million dollars (Pet. 6, note 8). What real difference would it have made to the petitioner if the government had sought a fine under the criminal penalties provided for in the statute, 33 U.S.C. § 1319(c), which could have made him liable for the payment of 55 million dollars? Given the ability to obtain civil penalties of such astronomical amounts, the enforcement efforts of the government will surely be limited to the collection of a civil penalty.

By opting for the civil penalty provisions of a statute, the government avoids the more onerous requirements which are encountered in a criminal prosecution with its obvious Sixth Amendment requirement for a jury trial. When the Fifth Amendment no longer applies, the government can, with the use of pre-trial discovery, require the defendant to produce documents and testify against himself in the civil case. The government no longer must concern itself with the presumption of innocence. Its case is measured by the less difficult preponderance of evidence standard rather than proof beyond a reasonable doubt. If the defendant's last protection, trial by jury, is eliminated, the technical distinction between a civil suit to enforce a substantial civil penalty and a criminal prosecution will be of little importance to the defendant. The defendant would, in fact, be better off if he were prosecuted criminally. A criminal prosecution would provide him with more constitutional protection and if the government prevails and destroys him financially, at least he will be provided food and shelter while he is imprisoned. The need for the Seventh Amendment's protection is known to all trial lawyers, and candidly admitted by one of this Court's former brethren.[10]

[10] "In our own times, the jury often has served as a deterrent to ambitious officials who wish to crush before them those who stand in their way. From where I sit reviewing some 3,500 cases a year, I often see the arbitrariness of a judge sitting as the thirteenth juror. One can easily imagine the extent of his severity when he

Amicus curiae believes that its unwavering commitment to the Seventh Amendment's right to trial by jury has substantial historical support. Nearly 200 years ago while extricating themselves from an oppressive government and forming a new government, our forefathers found the right of trial by jury in civil cases so important that they refused to ratify the Constitution until the Seventh Amendment was included.[11] Insistence upon inclusion of the Seventh Amendment was the culmination of a consistent belief in its necessity, and its deprivation by the tyrant is found in the Declaration of Independence.[12] Its inclusion in a document originally drafted by a Virginia planter-lawyer and signed by 56 leaders of the time, 24 of whom were lawyers and 2 of whom were judges, dispels the notion that it was insignificant and unnecessary. Petitioner and those similarly situated find themselves no less in need of the Seventh Amendment's protection than their forefathers.

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sits alone." *The American Jury: A Justification*, Tom C. Clark, Associate Justice, Supreme Court of the United States, 1 Val. L. Rev. 1, 4-5 (1966).

[11] "The objection to the plan of the convention, which has met with most success in this state is relative to *the want of a constitutional provision for the trial by jury in civil cases.*" *The Federalist on the New Constitution*, Hamilton, Madison and May, written in the year 1788, Hallowell 1831, p. 411 (emphasis supplied).

[12] ". . . For depriving us, in many cases, of the benefits of Trial by jury:" Declaration of Independence.

CONCLUSION

For these reasons and those stated in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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No. 85-1259

IN THE

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OCTOBER TERM, 1986

EDWARD LUNN TULL,
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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 24, 1986
CERTIORARI GRANTED MAY 27, 1986

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
		VOLUME I
1981		
July 1	1	Complaint.
July 2	—	Summons issued with 1 copy, delivered to Marshal with Magistrate's Notices.
July 24	2	Summons returned executed 7/22/81.
Aug. 5	3	Interrogatories on behalf of plaintiff.
Aug. 5	4	Request for production of documents on behalf of plaintiff.
Aug. 5	5	Requests for admission on behalf of plaintiff.
Aug. 5	6	Request for entry upon land on behalf of plaintiff.
Aug. 11	7	Motion for more definite statement on behalf of defendant.
Aug. 11	8	Demand for jury trial on behalf of defendant.

DATE	NR.	PROCEEDINGS
1981		
Aug. 11	9	Memorandum in support of demand for jury trial, received.
Aug. 28	10	Motion for protective order on behalf of defendant.
Aug. 28	11	Memorandum of law in support of motion for protective order, received.
Sep 3	12	Memorandum in opposition to defendant's motion for a jury trial, received.
Sep 3	13	Opposition to motion for more definite statement on behalf of plaintiff, received.
Sep 8	14	Memorandum in opposition to defendant's motion for protective order and memorandum, received.
Sep 10	15	Order denying defendant's motion for a more definite statement; denying defendant's motion for a jury trial, entered Sept. 9, 1981 & filed Sept. 10, 1981. JAM, j. Copies to counsel by judge's office.
Sep 14	16	Affidavit in support of motion for protective order on behalf of defendant.
Oct 1	17	Memorandum reply to plaintiff's memorandum in opposition to defendant's motion for protective order and memorandum, received.
Oct 16	—	Trial proceedings: JAM, j. Repr. R. Zahn. Counsel appeared. Matter came on for hearing on motion for protective order. Arguments of counsel heard. Court takes matter under advisement. Court directed
	18	defendant's answer and grounds of de-
	19	fense, answer to interrogatories, answer
	20	to plaintiff's request for production of

DATE	NR.	PROCEEDINGS
1981		
	21	documents and answers to plaintiff's requests for admission heretofore received be filed.
Nov 3	22	Opinion and order that defendant comply with plaintiff's demand for entry onto land; defendant is ordered to answer plaintiff's interrogatories numbered one, two, and three. Defendant is ordered to produce all those documents in his possession, custody or control necessary to comply with plaintiff's requests for production numbered one, two, three, and sixteen. Defendant must also comply with request for production thirteen, except insofar as any of the requested documents relate to fill materials or physical description of the subject properties, as to all other discovery demands of pltf., defendant's motion for a protective order is granted, entered Oct. 31, 1981 & filed November 3, 1981. Copies mailed by judge's office. JAM, j.
1982		
Jan. 7	23	Interrogatories on behalf of defendant.
Jan. 7	24	Request for production of documents on behalf of defendant.
Jan. 11	25	Supplemental interrogatories to defendant on behalf of plaintiff.
Jan. 11	26	Supplemental request for production of documents to defendant on behalf of plaintiff.
Jan 27	27	Order on initial pretrial conference, trial date July 27, 1982; final pretrial conference July 9, 1982 at 12:00 noon; all de bene esse depositions shall be concluded

DATE	NR.	PROCEEDINGS
1982		
		on or before June 18, 1922; pltf. to complete discovery on or before May 4, 1982; deft. on or before June 4, 1982; parties shall file a formal statement of the issues on or before Jan. 18, 1982; deft. to answer or respond on or before Jan. 22, 1982 (as set forth in Judge MacKenzie's order of October 31, 1981) ; any amended complaint shall be filed on or before Jan. 22, 1982; the court notes the agreement of counsel that Mr. Kane may inspect the property in question; any motion for summary judgment shall be filed, with supporting memorandum, on or before June 18, 1982, with response due on or before June 28, 1982. If no hearing is requested by June 29, the Clerk shall refer the file on June 30 to one of the judges for decision on any motion for summary judgment, entered Jan. 7, 1982 & filed Jan. 27, 1982.
Mar 19	28 29	Motion to compel discovery on behalf of defendant. Memorandum, received.
Mar 19	30	Statement required by local rule 11.1(J) on behalf of defendant.
Mar 24	31	Application of the United States for a grant of immunity to Edward Lunn Tull.
Mar 24	32	First motion to compel on behalf of plaintiff.
Mar 24	33	Memorandum in support of plaintiff's first motion to compel, received.
Mar 24	34	Second motion to compel on behalf of plaintiff.
Mar 24	35	Memoradum in support of plaintiff's second motion to compel, received.

DATE	NR.	PROCEEDINGS
1982		
Mar 24	36	Notice of deposition on behalf of plaintiff.
Mar 26	37	Notice to take deposition on behalf of plaintiff.
Mar 31	38	Notice of hearing to compel discovery on behalf of defendant.
Apr 1	39	Notice to take deposition on behalf of plaintiff.
Apr 2	—	Trial Proceedings: JAM, j. Rep., D. Zahn. Matter came on for hearing on motions to compel, etc. Arguments of counsel. Court's rulings stated in record. Order entered and filed re a grant of immunity to Elwood Lunn Tull. Court directed that all motions, answers, etc. heretofore "lodged" be filed.
Apr 2	40	Order directing Edward Lunn Tull to testify and provide information in response to interrogatories, depositions and at trial; further that none of his testimony or other information so compelled by this Order or any information directly or indirectly derived from such testimony or other information may be used against the Edward Lunn Tull in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Court's Order; further that if Tull refuses to testify and provide other information during the course of the grand jury's inquiry the Court will hear and receive an application for an Order holding Edward Lunn Tull in contempt, entered & filed April 2, 1982. JAM, j.
Apr 2	41	First amended complaint on behalf of plaintiff.

DATE	NR.	PROCEEDINGS
1982		
Apr 2	42	Answer to interrogatories on behalf of defendant.
Apr 2	43	Answer to request for production of documents on behalf of defendant.
Apr 2	44	Answer to defendant's request for production of documents on behalf of plaintiff.
Apr 2	45	Answers to defendant's interrogatories on behalf of plaintiff.
Apr 2	46	Response to plaintiff's supplemental interrogatories to defendant.
Apr 2	47	Supplemental answers to defendant's interrogatories on behalf of plaintiff.
Apr 12	48	Order directing defendant to respond to discovery, etc., entered & filed April 2, 1982. JAM, j.
Apr 21	49	(3) Notice to take deposition on behalf of plaintiff.
Apr 22	—	Transcript of proceedings of April 2, 1982.
Apr 23	50	Notice of deposition on behalf of plaintiff.
May 3	51	Motion for a temporary restraining order and temporary injunction on behalf of the plaintiff.
May 3	52	Affidavit of Gerald D. Tracy.
May 3	53	Affidavit of Douglas Davis.
May 3	54	Memorandum in support of the motion for temporary restraining order and for a temporary injunction on behalf of the plaintiff received.
May 3	55	Supplemental respond to defendant's interrogatory #3 on behalf of the plaintiff.

DATE	NR.	PROCEEDINGS
1982		
May 3	56	Response by United States for request for production of a report on a meeting between the parties.
May 4	57	Supplemental response to defendant's interrogatory #9 on behalf of plaintiff.
May 7		Trial Proceedings: JCC, Jr., j. Ct. Rept. H. Weiss. Counsel appeared. Came on for hearing of motion for temporary restraining order and for temporary injunction on behalf of the plaintiff. Evidence of plaintiff heard. Motion of defendant for a directed verdict argued. Denied. Findings from bench. Judgment: Defendant enjoined until trial of this case on merits or until further order of this court. Counsel will present order. Order effective from time of ruling.
May 7	58	Order directing Edward Lunn Tull and his agents and employees and contractors hired by him to forthwith cease and desist from depositing of sand or other fill material on property known as Mire Pond Two which is located to the north of Mire Pond Camper Site and which is adjacent to Fowling Gut on the Island of Chincoteague, Virginia; directing Edward Lunn Tull to cease and desist until this case is heard on its merits at trial and judgment ordered of until further order of this court, entered & filed May 7, 1982. JCC, Jr., j. Six certified copies given to Jack Kane/U.S. Attorney—he wants to distribute to all parties. o.b.
May 13	59	Order granting defendant, Edward Lunn Tull, leave to file a late answer to the first

DATE	NR.	PROCEEDINGS
1982		
		amended complaint of plaintiff, entered & filed May 13, 1982. Copies mailed 5/13/82.
May 13	60	Answer to first amended complaint of plaintiff.
May 14	61	Notice of the taking of depositions on behalf of defendant.
May 19	62	Amended notice of the taking of depositions on behalf of defendant.
May 19	63	Supplemental answers to defendant's interrogatories on behalf of plaintiff.
May 28	64	Notice of the taking of depositions on behalf of defendant.
Jun 4	65	Third motion to compel on behalf of plaintiff.
Jun 4	66	Motion for a protective order on behalf of defendant.
Jun 14		Transcript of hearing on temporary restraining order held on May 7, 1982.
Jun 14		Depositions of William S. Sipple, Richard Summer, John R. Pomponio and Gene Silberhorn, received.
Jun 14		Depositions of John W. Clay, Milton L. McCarthy, Gene Cocke and Richard Sumner, received.
Jun 14	67	Notice of the taking of Depositions, etc., on behalf of the defendant.
June 17	68	Response to plaintiff's motion for a protective order on behalf of defendant.
June 17	69	Response to plaintiff's third motion to compel on behalf of defendant.

DATE	NR.	PROCEEDINGS
		VOLUME II
1982		
Jun 18	70	Motion to recuse the Honorable J. Calvitt Clarke, Jr. on behalf of defendant.
Jun 18	71	Affidavit in supoprt of the motion to recuse on behalf of defendant.
Jun 18	72	Memorandum of law in support of motion to recuse on behalf of defendant, received.
Jun 18	73	Motion for partial summary judgment on behalf of defendant.
Jun 18	74	Affidavit in support of motion for partial summary judgment on behalf of defendant.
Jun 18	75	Memorandum of law in support of motion for partial summary judgment on behalf of defendant, received.
Jun 21		Depositions of Don T. Turner, John Graham Nock and Charles Morris Powell, received.
Jun 23	76	Supplemental answer to defendant's interrogatory No. 1 on behalf of plaintiff.
Jun 28	77	Motion to bifurcate trial on behalf of plaintiff.
Jun 28	78	Affidavit in support of the motion to recuse the Honorable J. Calvitt Clarke, Jr., on behalf of defendant.
Jul 2	79	Motion for extension of time on behalf of plaintiff.
Jul 2	80	Memorandum in opposition to defendant's motion to recuse the Honorable J. Calvitt Clarke, Jr., received.
Jul 2	81	Memorandum in opposition to defendant's motion for partial summary judgment, received.

DATE	NR.	PROCEEDINGS
1982		
Jul 6	82	Memorandum in opposition to plaintiff's motion to bifurcate trail, received.
Jul 7	83	Order denying defendant's motion for recusal, entered & filed July 7, 1982. JCC, Jr., j. Copies mailed 7/7/82 by judge's office.
Jul 8	84	Affidavit in support of the motion to recuse the Honorable J. Calvitt Clarke, Jr.
Jul 8		Deposition of David Adams, received.
Jul 9	85	Order on final pretrial conference, entered in the presence of counsel, entered July 9, 1982. RBK, j.
Jul 12	86	Affidavit in support of renewed motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery.
July 12	87	Renewed motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery.
Jul 12	88	Memorandum in support of motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery, received.
Jul 12	89	Memorandum in rebuttal of motion for partial summary judgment on behalf of defendant, received.
Jul 12	90	Opinion and order denying the defendant's motion for partial summary judgment, entered & filed July 12, 1982. JCC, Jr., j. Copies to counsel by judge's office 7/12/82.

DATE	NR.	PROCEEDINGS
1982		
Jul 16		Deposition of Alexander Dolgos, received.
Jul 16		Deposition of Bruce F. Williams, received.
Jul 16		Deposition of Robert L. Oswald, received.
Jul 16		Deposition of Joseph R. Loschi, received.
Jul 22	91	Amended answer to plaintiff's interrogatories on behalf of defendant. (witnesses).
Jul 22	92	Amended answer to plaintiff's interrogatories on behalf of defendant. (exhibits).
Jul 22		Deposition of Julien R. Hume, III, received.
Jul 26		Summary of deposition of Edward Lunn Tull, April 7, 1982, received.
Jul 26		Summary of deposition of James Ballard, April 27, 1982, received.
Jul 26		Summary of deposition of Donald Lee Ballard, April 27, 1982, received.
Jul 26		Summary of deposition of Klein G. Leister, April 27, 1982, received.
Jul 26		Summary of deposition of Alexander J. Justice, April 27, 1982, received.
Jul 26		Summary of deposition of Ronald L. Beebe, April 28, 1982, received.
Jul 26		Summary of deposition of Edward Lunn Tull, April 28, 1982, received.
Jul 26	93	Motion to amend final pretrial order on behalf of plaintiff.
Jul 26	94	Proposed findings of fact and conclusions of law on behalf of defendant, received.
Jul 27		COURT PROCEEDINGS: RGD, j. Rep. Repr. C. Barnes. Plaintiff represented by

DATE	NR.	PROCEEDINGS
1982		
		Diane Donley, John F. Kane and Benjamin Kalkstein. Defendant represented by Richard R. Nageotte. Parties and counsel appeared. On motion, witnesses were excluded. Opening statements of counsel heard. Plaintiff presented evidence in part. Court adjourned until tomorrow at 9:30 a.m.
Jul 28		COURT PROCEEDINGS: Continuation of court trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence in part. Further proceedings continued until September 20, 1982 at 9:00 a.m.
Sep. 3	95	Motion to release exhibits No. 20, 42, 43, and 44 on behalf of plaintiff.
Sep. 3	96	Order releasing slides of exhibits 20, 42, 43 and 44 to the United States and be returned at the time that the trial of the action commences again; any prints of exhibits 20, 42, 43 and 44 should be retained by the Clerk, filed Sept. 3, 1982. RGD, j. Copies mailed to counsel.
Sep. 20	97	Memorandum of law on behalf of plaintiff, received 9/20/82.
Sep. 22	98	Memorandum of law on behalf of plaintiff, received 9/22/82.
Sep. 20		Trial Proceedings: RGD, j. Rep. C. Barnes. (proceedings in Wallops Island, Va.). Continuation of trial proceedings. Appearances—Jack Kane, Diane Donnelly, Benjamin Kalkstein on behalf of plaintiff. Richard R. Nageotte—behalf of defendant Edward Lunn Tull. Came on for

DATE	NR.	PROCEEDINGS
1982		
		further trial proceedings. By agreement, defendant presented evidence in part. Plaintiff resumed presentation of evidence. Note—Court, counsel and parties viewed property on Chincoteague Island. Further proceedings continued until tomorrow at Norfolk at 10:15 a.m. Court adjourned.
Sep. 21		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of trial proceedings. Parties and counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Further proceedings continued until tomorrow morning at 10:00 a.m.
Sep. 22		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Further proceedings continued until tomorrow morning at 10:15 a.m.
Sep. 23		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Deft. moved for mistrial—Denied. Court adjourned until Monday morning at 11:00 a.m. (9/27/82).
Sep. 27		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment on 9/23/82. Plaintiff resumed presentation of evidence, and rested. Deft. moved for directed verdict and for summary judgment—RULING WITHHELD. Plain-

DATE	NR.	PROCEEDINGS
1982		
		tiff moved to amend—RULING WITHHELD. Further proceedings continued until tomorrow morning at 10:00 a.m.
Sep. 28		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Comments of Court heard. Court will allow plaintiff re re-open case and will grant leave to amend. Plaintiff to file amendment within 7 days. Court will server this trial as to Ocean Breeze. Trial as to Ocean Breeze re-set for 11-22-82. Plaintiff to supplement answers to interrogatories within 2 weeks Deft. moved for mistrial—DENIED. Deft. presented evidence in part. Court adjourned until tomorrow morning at 9:30 a.m. (9/29/82).
Sep 29		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Deft. resumed presentation of evidence. Further proceedings continued until Tuesday, 10-5-82 at 10:00 a.m.
Oct 5	99	Second amended complaint.
Oct 6	100	Interrogatories on behalf of defendant. S: hd10/5/82. (filed by Court)
Oct 6	101	Request for production of documents on behalf of defendant. S: hd10/5/82. (filed by Court)
Oct 6	102	Request for admissions on behalf of defendant filed by Court. S:hd10/5/82.
Oct 5		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties &

DATE	NR.	PROCEEDINGS
1982		
		counsel appeared pursuant to adjournment on 9-29-82. Deft. resumed presentation of evidence in part. Court adjourned until tomorrow morning at 10:00 a.m.
Oct 6		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties & counsel appeared pursuant to adjournment yesterday. Deft. resumed presentation of evidence in part. Further proceedings continued until tomorrow morning at 9:30 a.m.
Oct 7		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties and counsel appeared pursuant to adjournment of last evening (10/6/82). Deft. resumed presentation of evidence and rested with exception of deposition to be taken. Plaintiff presented rebuttal evidence in part. Resumes of James R. Hubbard received. Further proceedings continued until November 22, 1982.
Oct 8	103	Memorandum of law supporting defendant Tull's standing to challenge the constitutionality of the statute, received.
Oct 25	104	Supplemental responses to defendant's interrogatories 6, 7 and 8 on behalf of plaintiff.
Oct 26	105	Amended request for admissions on behalf of defendant filed by Court.
Oct 26	106	Answer and grounds of defense to second amended complaint on behalf of defendant, filed by Court.
Oct 27	107	Letter appointing expert witness, Professor Donna Ware (fee to be taxed).

DATE	NR.	PROCEEDINGS
1982		
Nov 4	108	Answers to defendant's interrogatories on behalf of plaintiff.
Nov 4	109	Responses to defendant's amended requests for admissions on behalf of plaintiff.
Nov 4	110	Response to defendant's request for production of documents on behalf of plaintiff.
Nov 15		Excerpt from deposition of Mark J. Harrell, received.
Nov 19		Deposition of Julien Robert Hume, III on behalf of defendant, received.
Nov 22		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Continuation of trial. Mr. John Kane, AUSA and Mrs. Diane L. Donley AUSA; deft. present with his counsel Mr. Richard Nageotte. Matter came on for continuation of trial. Plaintiff resumed presentation of rebuttal evidence. Plaintiff rested. Deft. presented evidence in part. Court adjourned until tomorrow morning at 10:00 a.m. (11/23/82).
Nov 23		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Parties and counsel appeared pursuant to adjournment of last evening (11/22/82). Deft. resumed presentation of evidence. Deposition of Gene Silberhorn read in open court. Deft. rested. Courts expert Dr. Donna M. E. Ware testified. Plaintiff presented rebuttal evidence in part. Court adjourned until tomorrow morning at 10:00 a.m.
Nov 24		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Parties and counsel appeared pursuant to adjournment of last evening (11/23/82). Plaintiff resumed presentation of rebuttal evidence and rested. Final arguments of counsel heard. Court takes matter under advisement. Counsel to submit finding of facts and conclusions of law in 21 days.
Dec. 14	111	Order extending the time for filing proposed findings of fact to Dec. 22, 1982, entered & filed Dec. 14, 1982. RGD, j. Copies to counsel.
Dec. 22	112	Additional proposed findings of fact and conclusions of law on behalf of defendant, received.
Dec. 27	113	Findings of fact on behalf of plaintiff, received.
Dec. 27	114	Post-trial brief on behalf of plaintiff, received.
1983		
Sep 12	115	Petition to enter an order vacating temporary injunction on behalf of defendant.
	116	Notice of hearing. Memorandum in support of petition, received.
	117	
Sep 26	118	Praecipe on behalf of defendant.
Sep 28		TRIAL PROCEEDINGS: RGD, j. Ct. rep. C. Barnes. John F. Kane, Asst. U.S. Attorney, Diane L. Donley & Benjamin Kalstein appeared on behalf of the U.S. Defendant appeared with counsel, Richard Nageotte. Came on for presentation of Court's opinion. Comments of Court and counsel heard. Court set supersedeas bond in the amount of $150,000.00 Court adjourned.

DATE	NR.	PROCEEDINGS
1983		
Sep 30	119	Opinion and order, entered & filed Sept. 28, 1983. RGD, j. Copies hand-delivered to counsel by judge's office.
Sep 30	120	Order granting judgment in favor of the United States of America against the defendant and total penalties (or civil fines) in the sums of $35,000, $35,000.00 and $5,000.00; further directing defendant to remove from fill and/or restore certain lots to wetlands as provided therein; and directing payment of a fine in the sum of $250,000.00 with provision for filing an election within 10 days, etc., defendant shall post a penalty bond with a corporate surety approved by the Clerk in the sum of $300,000.00 with certain conditions as set forth therein; permanently enjoining and filling of any kind of lots 8(A), 9(A), 10(A), 11(A), 12(A), 13(A) and 22(A) in Mire Pond Section II * * *; and further directing that the chargeable costs be borne by the defendant, including therewith an $800.00 expert witness fee to be paid to Professor Donna M. E. Ware, etc., any request for attorney's fees and expenses shall be filed within 10 days; and any prior injunction herein shall be null and void upon the entry of and compliance with this order, entered & filed Sept. 28, 1983. RGD, j. Copies hand-delivered to counsel by judge's office. o.b.

VOLUME III

Oct 7	121 122	Motion for a new trial on behalf of defendant. Memorandum in support of motion, received.

DATE	NR.	PROCEEDINGS
1983		
Oct 11	123	Order staying part and portions of the judgment decree of this Court entered 9/28/83; conditioned upon posting of a supersedeas bond in the sum of $150,000.00, in cash or with comp. surety and granting 21 days to submit any add. financial info., etc., for reduction of this bond, etc.; and extending the time for election as to restoration of Fowling Gut, entered Oct. 6, 1983 & filed Oct. 7, 1983. RGD, j. Copies mailed by judge's office.
Oct 11	124	Motion for payment of attorneys fee on behalf of plaintiff.
Oct 11	125	Motion for payment of deposition costs and extension of time for submission and of itemization of deposition cost on behalf of plaintiff.
Oct 11	126	Bill of costs on behalf of plaintiff.
Oct 18	127	Order directing clerk to accept as bond in this case, in lieu of cash, certificates of deposit in the total sum of One Hundred Fifty Thousand Dollars ($150,000.00), etc.; further directing that all interest earned on the said certificates of deposit shall be paid by the banks when earned directly to the defendant, etc.; and directing this order shall not otherwise modify the previous orders of this Court except as set forth specifically herein, entered & filed Oct. 18, 1983. RGD, j. Copy to Mr. Kane & Mr. Tull's representative. certified copies to J. Stapleford, financial section, Marine Bank & F & M Bank. o.b.
Oct 18	128	Bond, with 2 certificates of deposit, as security filed.

DATE	NR.	PROCEEDINGS
1983		
Oct 19	129	Brief in opposition to defendant's motion for a new trial on behalf of plaintiff, received.
Nov 4	130 131	Petition on behalf of defendant. Memorandum in support of petition for relief, received.
Nov 16	132	Response to petition of defendant on behalf of plaintiff.
Dec 16		COURT PROCEEDING: RGD, j. Rep. C. Barnes. Counsel appeared. Came on for hearing re defts. petition. Comments of counsel & court heard. (Court takes under advisement as to motion for new trial), Defts. petition is Denied.
1984		
Jan 5	133	Order denying defendant's petition for relief from the final judgment entered by this Court on Sept. 28, 1983; allowing the defendant 30 days from the date hereof in which to elect whether to restore the waterway or pay the fine, entered & filed Jan. 5, 1984. RGD, j. Copies mailed by judge's office.
Jan 5	134	Judgment on decision by the court, that defendant's petition for relief from the final judgment entered by this Court on September 28, 1983 is DENIED, entered by clerk Jan. 5, 1984. Certified copies to counsel. o.b.
Jan 11	135 136	Motion to alter or amend judgment on behalf of defendant. Memorandum in support of motion, received.
Jan 12	137 138	Motion for rehearing on behalf of defendant. Memorandum in support of motion, received.

DATE	NR.	PROCEEDINGS
1984		
Jan 12	139	Affidavit of Richard R. Nageotte.
Jan 12	140	Affidavit of Edward Lunn Tull.
Jan 12	141	Affidavit of Ronald Beebe.
Feb 6	142	Opposition to motion for rehearing on behalf of plaintiff.
Feb 6	143	Response to motion to alter or amend judgment on behalf of plaintiff.
Feb 10	144	Supplemental opposition to defendant's motion for a new trial on behalf of plaintiff.
Feb 14	145	Response to plaintiff's response to motion to alter or amend judgment on behalf of defendant.
Feb 14	146	Response to plaintiff's opposition to motion for rehearing on behalf of defendant.
Feb 16	147	Order denying defendant's motion to alter or amend the judgment of this Court entered on January 5, 1984 and denying defendant's motion for a rehearing of the Court's previous denial of Tull's petition for relief, entered & filed Feb. 16, 1984. RGD, j. Copies mailed by judge's office.
Jun 1		Transcript of court proceedings before the Honorable Robert G. Doumar on December 16, 1983.
Jun 26	148	Order denying defendant's motion for a new trial filed on October 7, 1984, advising defendant that the time for appeal will run from the date of this order, entered & filed June 26, 1984. RGD, J. Copies mailed by judge's office.
Jun 26	149	Judgment on decision by the court, that defendant's motion for a new trial is Denied,

DATE	NR.	PROCEEDINGS
1984		
		entered by clerk June 26, 1984 & filed. Certified copies to counsel o.b.
July 5	150 150A	Motion to reconsider denial of new trial on behalf of defendant. Brief in support of motion, received.
July 6		(15) transcripts of trial.
July 13	151	Order denying defendant's motion for reconsideration, entered & filed July 13, 1984. RGD, j. Copies mailed by judge's office.
July 13	152	Judgment on decision by the Court, that defendant's motion for reconsideration is Denied, entered by clerk July 13, 1984 & filed. Certified copies mailed. o.b.
July 19	153	Notice of appeal on behalf of defendant.
July 20	—	Conformed copy of notice of appeal mailed to clerk, U.S. Court of Appeals, (with copy of docket entries) and to Richard Nageotte (hand-delivered 10B notice 7/19/84), and John F. Kane and Diane L. Donley, attorneys for plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

v.

EDWARD LUNN TULL,
Appellant.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
07-25-84	Case docketed. ROA filed. ses
07-25-84	BRIEFING ORDER, filed. A due 09-04-84. Tentative argument set for 1984 November session. ses
07-31-84	DISCLOSURE STMNT, A, N, filed. ses
08-03-84	DESIGNATION, A, parts of record to be included in appendix, filed. ses
8/10/84	MOTION (H-52) of E for additional time to file brief, filed (BMM:jm) Motion deferred until filing of A's brief and joint appendix
08-13-84	DESIGNATION, E, parts of record to be included in appendix, filed. ses
9/4/84	MOTION (I-17) of A to include Addendum A and B in his brief, filed (BMM:jm)
9/10/84	ORDER extending the time to file E's brief to 10/25/84, filed (BMM:jm) Copy to Nageotte; Kane; Kalkstein; Donley; Matzen-McGuire
9/18/84	Response of E to motion I-17 of A, filed. jd

DATE	FILINGS—PROCEEDINGS
9/19/84	LTR denying motion I17. (BMM:jd) Copy to counsel.
10/19/84	MOTION of E for ext. of time (J-141) to file brf, filed. jd
10/22/84	ORDER granting motion J-141. E's brf due 11/1/84. (BMM:jd) Copy to counsel.
10/23/84	OPPOSITION of A to motion for extension of time, filed (SAR:jm)
11/14/84	MOTION of A (K-81) that the rules be waived so as to permit the filing of a large photograph as a part of his reply brf, filed. MOTION DENIED on 11/15/84. (BMM:jd) Copy to counsel.
12/6/84	MOTION of E that pages seven and twenty-four be deleted from A's reply brf., or, in the alternative that it be granted leave to respond in writing, filed. jd
12/7/84	Response of A to E's motion of 12/6/84, filed. jd
12/10/84	ORDER denying motion of 12/6/84. (BBM:jd) Copy to counsel. . .
5/29/85	JOINT MOTION to release plaintiff's Exhibits No. 1, 1A, 2, 2A, 2B, and 29 to Richard R. Nageotte, filed. jd (E-176)
5/29/85	ORDER granting motion E-176. Copy to counsel. (BMM:jd)
8/9/85	MOTION (H-47) of A for stay of mandate, filed (DHB:nac)
8/9/85	PETITION FOR REHEARING (H-48) and Suggestion for Rehearing In Banc of A, filed (DHB:nac)
8/12/85	Transmitted A's pet. for reh. and sug. for reh. in banc to HLW; EMS; DDW (U.S.D.J.) (DHB: nac) With copy of pet. to all circuit judges

DATE	FILINGS—PROCEEDINGS
8/13/85	Letter denying A's motion for stay of mandate, filed (SAR:nac)
8/28/85	MOTION of E (H-176) for ext. of time in which to answer the pet. for rehearing, filed. jd.
8/28/85	ORDER granting motion H-176. E's answer to pet. for rehearing due 9/12/85. (SAR:jd) Copy to counsel and court and DDW.
08/09/85	Bill of costs, E, filed.
09/09/85	Bill of costs not taxed at this time; no statutory authority cited. Copies to Nageotte, Kalkstein, Matzen/McGuire. lgs
09-12-85	RESPONSE (H-48) to A's petition for rehearing and suggestion for rehearing in banc of E, filed (DHB:cw) Transmitted to HLW, EMS, DDW on 09-13-85.
10-30-85	ORDER denying H-48, filed (BHR:cw) Copy of order sent to Negeotte, Kane, Kalkstein, Donley and Matzen-McGuire.
11-04-85	REVISED ORDER denying H-48, filed (BHR:cw) copy of order sent to same counsel as 10-30-85 order.
11-05-85	MOTION (K-22) of A for stay of mandate pending writ of certiorari, filed. bhr Transmitted to HLW, EMS, DDW.
11/18/85	ORDER denying motion K-[illegible], filed (BHR:jm) Copy to Nageotte; Kalkstein; Matzen-McGuire
11/22/85	REVISED ORDER denying motion K-22 filed (BHR:jm) Copy to Nagoette; Kalkstein; Matzen-McGuire
11/26/85	Bill of costs taxed. Copies to Nageotte, Kalstein/ Matzen/ McGuire. lgs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action File No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Justin W. Williams, United States Attorney, John F. Kane, Assistant United States Attorney, Eastern District of Virginia, P. O. Box 60, Norfolk, Virginia 23501; Diane L. Donley, Attorney, Environmental Defense Section, Land and Natural Resources Division, U.S. Department of Justice, 9th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

W. FARLEY POWERS, JR.
Clerk of court

/s/ Martha E. Graham
Deputy Clerk
[SEAL OF COURT]

Date: July 2, 1981

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NOTICE TO PARTIES OF RIGHT TO CONSENT TO JURISDICTION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. Sec. 36(c)(2) the parties to this action are hereby notified of their right to consent to the conduct of any or all proceedings in this civil action, including the entry of dispositive orders, by a United States Magistrate specially designated by the Court to exercise such jurisdiction. Please indicate your decision concerning consent to such jurisdiction at the foot of this form. *Your decision should be communicated to the Clerk of this Court.* Be assured that neither a district judge nor a magistrate shall attempt to persuade or induce any party to consent to the reference of this matter to a magistrate.

You are further notified that if all parties consent to the exercise of jurisdiction in this case by a magistrate, appeal from the judgment of a magistrate will be to the United States Court of Appeals for the Fourth Circuit unless all the parties to this action further consent to appeal to a district judge. If appeal to a district judge is elected by all of the parties, only upon petition for leave to appeal by a party stating specific objections to the judgment. Election of this method of appeal shall not limit any party's right to seek review by the Supreme Court of the United States.

The form attached hereto, duly completed, should be returned to the Clerk by the plaintiff(s) within twenty (20) days from the date of receipt hereof and by defendant(s) with the filing of the answer or responsive motion.

W. FARLEY POWERS, JR.
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff(s),

vs.

EDWARD LUNN TULL,
Defendant(s).

**DECISION ON JURISDICTION
OF UNITED STATES MAGISTRATE**

The undersigned party hereby consents/declines to consent [delete inappropriate word(s)] to exercise of jurisdiction in this civil action by a duly designated U.S. Magistrate pursuant to 28 U.S.C. Sec. 636(c)(1), to the full extent provided in said statute.

[Make election in following paragraph only if you consented to jurisdiction]

The undersigned party further elects the method of appeal set forth below, should judgment in this action be made by a magistrate:

—— Appeal directly to the Fourth Circuit Court of Appeals (28 U.S.C. Sec. 636(c)(3)

—— Appeal to a district judge with further review by the Fourth Circuit Court of Appeals upon petition for leave to appeal (28 U.S.C. Sec. 636(c)(4) & (5))

Name of Party

By _____

Signature of party,
authorized officer or counsel
(Type or print name &
indicate capacity on line
below)

_____

Date:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

COMPLAINT

The United States of America, through its undersigned attorney and by authority of the Attorney General alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act (hereinafter the Act), 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311 and 33 U.S.C. 1344, respectively.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed $10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breezes Mobile Home Sites and Ocean Breezes Mobile Home Sites Section B, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breezes Mobile Home Sites and Ocean Breezes Mobile Home Sites Section B are waters of the United States.

10. Between September 28, 1977 and November 14, 1980 at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311 (a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitled the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyser Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. As specific times best known to the defendant, but sometime between December 6, 1980 and December 11, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, and

Three above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of $10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, and Three above;

4. Plaintiff be awarded the costs and disbursements of this action; and

5. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

JUSTIN W. WILLIAMS
United States Attorney

/s/ John F. Kane
JOHN F. KANE
Assistant United States Attorney
Eastern District of Virginia
P.O. Box. 60
Norfolk, Virginia 24501

/s/ Diane L. Donley
DIANE L. DONLEY
Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Of Counsel
Benjamin Kalstein
Attorney, United States
Environmental Protection Agency
Region III
Philadelphia, PA 19106

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

vs.

EDWARD LUNN TULL,
Defendant

ANSWER AND GROUNDS OF DEFENSE

ANSWER

COMES NOW your Defendant, Edward Lunn Tull, by counsel who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America respectfully answers the Complaint heretofore exhibited against him as follows:

1. The allegations contained in paragraph 1 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in paragraph 2 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in paragraph 3 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal con-

clusions require answer, they are denied. The allegation that notice of commencement of this action has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in paragraph 4 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in paragraph 5 of the Complaint are admitted.

CLAIM ONE

6. The allegations contained in paragraph 6 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in paragraph 7 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in paragraph 8 of the Complaint are denied.

9. The allegations contained in paragraph 9 of the Complaint are denied.

10. The allegations contained in paragraph 10 of the Complaint are denied.

11. The allegations contained in paragraph 11 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit

was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in paragraph 12 of the Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in paragraph 6 and 7 of the Complaint are hereby realleged and incorporated by reference herein as if fully set forth herein.

14. The allegations contained in paragraph 14 of the Complaint are denied.

15. The allegations contained in paragraph 15 of the Complaint are denied.

16. The allegations contained in paragraph 16 of the Complaint are denied.

17. The allegations contained in paragraph 17 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in paragraph 18 of the Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in paragraphs 6 and 7 of the Complaint are hereby realleged and incorporated by reference herein as if fully set forth herein.

20. The allegations contained in paragraph 20 of the Complaint are admitted.

21. The allegations contained in paragraph 21 of the Complaint are denied.

22. The allegations contained in paragraph 22 of the Complaint are denied.

23. The allegations contained in paragraph 23 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in paragraph 24 of the Complaint are denied.

GROUNDS OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his grounds of defense to the Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United States of America, relies as set out in this Complaint are unconstitutional as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America seek to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America, that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

(1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.

(2) The statutes and/or regulations as enforced deny to your Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.

(3) The statutes and/or regulations as enforced against your Defendant and others similarly situated are a sham and subtrefuge the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is

the established policy of the Secretary of the Army through its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all permit requests the purpose of which is to fill wetlands.

(4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute but are, in fact, used and administered in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.

(5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of $10,000.00 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res adjudicata and/or collateral estoppel. In support thereof your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof your Defendant alleges that the real property which is the subject of this Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the Complaint heretofore exhibited against him such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your Defendant the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plaintiff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America. Your Defendant further alleges that said activities would not have been conducted by him but for the specific authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel and laches to maintain this suit against your Defendant.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

(a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly

and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

(b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violations of the Rivers and Harbors Act of 1899 and under the statutes upon which Plaintiff relies in this Complaint.

(c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.

(d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.

(e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.

(f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits the purpose of which is to subject your Defendant to severe emotional

stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

(g) That your Defendant is upon information and belief that the Complaint heretofore exhibited against him is a continuation of the aforesaid conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.

(h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery in this case.

WHEREFORE, your Defendant having hereinabove set out his Grounds Of Defense to the Complaint hereinabove exhibited against him respectfully prays that the Complaint be dismissed together with his costs including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

FIRST AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act (hereinafter the Act), 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) of the Clean Water Act, 33 U.S.C. 1311.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed $10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or about September 28, 1977 and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraph Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Gowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33

U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometime commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of said, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraph Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiff's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three, and Four above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of $10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;

4. Plaintiff be awarded the costs and disbursements of this action; and

5. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

ELSIE MUNSELL
United States Attorney

JOHN F. KANE
Assistant United States Attorney
Eastern District of Virginia
P.O. Box 60
Norfolk, Virginia 23501

DIANE L. DONLEY
Attorney, Environmental Defense Section
Land and Natural Resources Division
9th and Pennsylvania Avenue, N.W.
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Of Counsel

Benjamin Kalkstein
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Region III
Philadelphia, PA 19106

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant

ANSWER AND GROUNDS OF DEFENSE

ANSWER

COMES NOW your Defendant, Edward Lunn Tull, by Counsel, who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of American, respectfully answers the First Amended Complaint of Plaintiff, United States of America, heretofore exhibited against him as follows:

1. The allegations contained in Paragraph 1 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in Paragraph 2 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in Paragraph 3 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that

said legal conclusions require answer, they are denied. The allegation that notice of commencement of this suit has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in Paragraph 4 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in Paragraph 5 of the First Amended Complaint are admitted.

CLAIM ONE

6. The allegations contained in Paragraph 6 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in Paragraph 7 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in Paragraph 8 of the First Amended Complaint are denied.

9. The allegations contained in Paragraph 9 of the First Amended Complaint are denied.

10. The allegations contained in Paragraph 10 of the First Amended Complaint are denied.

11. The allegations contained in Paragraph 11 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in Paragraph 12 of the First Amended Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in Paragraph 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 13.

14. The allegations contained in Paragraph 14 of the First Amended Complaint are denied.

15. The allegations contained in Paragraph 15 of the First Amended Complaint are denied.

16. The allegations contained in Paragraph 16 of the First Amended Complaint are denied.

17. The allegations contained in Paragraph 17 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in Paragraph 19 of the First Amended Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in Paragraphs 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 19.

20. The allegations contained in Paragraph 20 of the First Amended Complaint are admitted.

21. The allegations contained in Paragraph 21 of the First Amended Complaint are denied.

22. The allegations contained in Paragraph 22 of the First Amended Complaint are denied.

23. The allegations contained in Paragraph 23 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in Paragraph 24 of the First Amended Complaint are denied.

CLAIM FOUR

25. The answers provided by Defendant in Paragraphs 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 25.

26. Your Defendant admits that he owns and/or controls additional land in the vicinity of the properties described in Paragraphs 8, 15, and 21 of the First Amended Complaint. Further, your Defendant admits that he intends to improve and/or develop said property owned and/or controlled by him to the full extent permitted by law. All other allegations contained in Paragraph 26 of the First Amended Complaint are denied. Your Defendant would further, specifically and affirmatively, allege that your Plaintiff seeks to deny to your Defendant the use and benefit of his property in violation of the Constitution of the United States of America.

WHEREFORE your Defendant, Edward Lunn Tull, having hereinabove set out his Answer to the First Amended Complaint heretofore exhibited against him, respectfully prays that the Complaint be dismissed together with his costs, including his reasonable attorney's fees in defense thereof.

GROUNDS OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by Counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his Grounds of Defense to the First Amended Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the First Amended Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United States of America, relies as set out in this First Amended Complaint are unconstitutional as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America seek to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively, if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America,

that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

(1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.

(2) The statutes and/or regulations as enforced deny to your Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.

(3) The statutes and/or regulations as enforced against your Defendant and others similarly situated are a sham and subterfuge, the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is established policy of the Secretary of the Army through its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all permit requests, the purpose of which is to fill wetlands.

(4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute, but are, in fact, used and administered in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.

(5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of $10,000 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res judicata and/or collateral estoppel. In support thereof, your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof, your Defendant alleges that the real property which is the subject of this First Amended Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the First Amended Complaint heretofore exhibited against him, such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your

Defendant, the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plaintiff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America. Your Defendant further alleges that said activities would not have been conducted by him but for the specific authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel and laches to maintain this suit against your Defendant.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

(a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

(b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violation of the Rivers and Harbors Act of 1899 and under the statutes upon which Plaintiff relies in this First Amended Complaint.

(c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.

(d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.

(e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.

(f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits, the purpose of which is to subject your Defendant to severe emotional stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

(g) That your Defendant is upon information and belief that the First Amended Complaint heretofore exhibited against him is a continuation of the aforesaid conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.

(h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the First Amended Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your Defendant intends to rely upon the defense of immunity from prosecution and in support thereof would specifically allege as follows:

(a) That on the 2nd day of April, 1982, this Court entered an order at the request of Plaintiffs, granting to Defendant immunity from prosecution.

(b) That the penalties sought by the Plaintiff herein are criminal and or quasi-criminal in nature, notwithstanding that Plaintiff seeks to assert that the said penalties are civil in nature.

(c) That by reason of the aforesaid immunity from prosecution your Defendant may not be prosecuted by Plaintiff and/or subject to the relief sought by Plaintiff in its First Amended Complaint.

8. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery in this case.

Wherefore, your Defendant, having hereinabove set out his Grounds of Defense to the First Amended Complaint heretofore exhibits against him, respectfully prays that the First Amended Complaint be dismissed together with his costs including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

By /s/ Edward Lunn Tull
Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE, ESQ.
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,
v.
EDWARD LUNN TULL,
Defendant.

SECOND AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301 (a) of the Clean Water Act, 33 U.S.C. 1311 and pursuant to Section 12 of the Rivers and Harbors Act, 33 U.S.C. 406, to obtain injunctive relief for defendant's failure to comply with Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319, and 33 U.S.C. 406. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed $10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or after July 1975, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of said, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will con-

tinue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chinocteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged polluants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometimes commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act,

33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiffs's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

CLAIM FIVE

27. Section 10 of the Rivers and Harbors Act of 1899 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States except as authorized by the Secretary of the Army and recommended by the Chief of Engineers, 33 U.S.C. 403.

28. On plaintiffs' information and belief, defendant filled the navigable water of the United States on the real property commonly known as Ocean Breeze Mobile Home Sites without the authorization of the Secretary of the Army and the recommendation of the Chief of Engineers.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three,

and Four above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of $10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;

4. This Court enter an injunction requiring defendant to remove the obstruction unlawfully created in the navigable waters of the United States as described in Claim Five.

5. Plaintiff be awarded the costs and disbursements of this action; and

6. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

ELSIE MUNSELL
United States Attorney

JOHN F. KANE
Assistant United States Attorney
Eastern District of Virginia
P.O. Box 60
Norfolk, Virginia

/s/ Diane L. Donley
DIANE L. DONLEY
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

vs.

EDWARD LUNN TULL
Defendant

ANSWER AND GROUNDS OF DEFENSE TO SECOND AMENDED COMPLAINT

COMES NOW your Defendant, Edward Lunn Tull, by counsel, who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, respectfully answers the Second Amended Complaint of Plaintiff, United States of America, heretofore exhibited against him as follows:

1. The allegations contained in Paragraph 1 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in Paragraph 2 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in Paragraph 3 of the Second Amended Complaint consist of legal conclusions,

not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied. The allegation that notice of commencement of this suit has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in Paragraph 4 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in Paragraph 5 of the Second Amended Complaint are admitted.

CLAIM ONE

6. The allegations contained in Paragraph 6 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in Paragraph 7 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in Paragraph 8 of the Second Amended Complaint are denied.

9. The allegations contained in Paragraph 9 of the Second Amended Complaint are denied.

10. The allegations contained in Paragraph 10 of the Second Amended Complaint are denied.

11. The allegations contained in Paragraph 11 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal con-

clusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in Paragraph 12 of the Second Amendment Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 13.

14. The allegations contained in Paragraph 14 of the Second Amended Complaint are denied.

15. The allegations contained in Paragraph 15 of the Second Amended Complaint are denied.

16. The allegations contained in Paragraph 16 of the Second Amended Complaint are denied.

17. The allegations contained in Paragraph 17 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in Paragraph 18 of the Second Amended Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 19.

20. The allegations contained in Paragraph 20 of the Second Amended Complaint are admitted.

21. The allegations contained in Paragraph 21 of the Second Amended Complaint are denied.

22. The allegations contained in Paragraph 22 of the Second Amended Complaint are denied.

23. The allegations contained in Paragraph 23 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in Paragraph 24 of the Second Amended Complaint are denied.

CLAIM FOUR

25. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 25.

26. Your Defendant admits that he owns and/or controls land in the vicinity of the properties described in Paragraphs 8, 14, and 20 of the Second Amended Complaint. Further, your Defendant admits that he intends to improve and/or develop said property owned and/or controlled by him to the full extent permitted by law. All other allegations contained in Paragraph 26 of the Second Amended Complaint are denied. Your Defendant would further, specifically and affirmatively, allege that your Plaintiff seeks to deny to your Defendant the use and benefit of his property in violation of the Constitution of the United States of America and that your Plaintiff seeks to take the property of your Defendant without just compensation in violation of the Constitution of the United States of America.

CLAIM FIVE

27. The allegations contained in Paragraph 27 of the Second Amended Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

28. The allegations contained in Paragraph 28 of the Second Amended Complaint are denied.

WHEREFORE your Defendant, Edward Lunn Tull, having hereinabove set out his Answer to the Second Amended Complaint heretofore exhibited against him, respectfully prays that the Complaint be dismissed together with his costs, including his reasonable attorney's fees in defense thereof.

GROUNDS OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his Grounds of Defense to the Second Amended Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the Second Amended Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and/or regulations upon which the Plaintiff, United States of America, relies are unconstitutional and/or unconstitutionally applied.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United

States of America, relies as set out in this Second Amended Complaint are unconstitutional and/or unconstitutionally applied as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America, seeks to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively, if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America, that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

(1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.

(2) The statutes and/or regulations as enforced by the Plaintiff and its agents deny to Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.

(3) The statutes and/or regulations as enforced by the Plaintiff and its agents against your Defendant and others similarly situated

are a sham and subterfuge, the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is the established policy of the Secretary of the Army through the Division and District Engineers, its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all Section 404 permit requests, the purpose of which is to fill wetlands.

(4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute but are, in fact, used and adminstered by the Plaintiff and its agents in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.

(5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of $10,000 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

(6) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied

to your Defendant and other similarly situated upon the grounds that the statute impermissibly delegates from the legislative body of the government to the administrative body of the government its legislative function and/or that the regulations adopted by the administrative body of the government are in fact legislative enactments exceeding the delegation of authority permitted by the Constitution from the legislative to the administrative branch of government. If the statute is not an impermissible delegation of the legislative function to the administrative branch of the government, the regulations adopted pursuant to the statute exceed the permissible grant of authority by the legislature and constitute legislation in violation of this principle of law.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res adjudicata and/or collateral estoppel. In support thereof, your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof, your Defendant alleges that the real property which is the subject of this Second Amended Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and

complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the Second Amended Complaint heretofore exhibited against him, such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your Defendant, the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plainitff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America, and/or that any of the activities constituted and/or was alleged to constitute a violation of any statute and/or regulation notwithstanding the affirmative duty imposed by regulation on the agents of Plaintiff to advise the Defendant. Your Defendant further alleges that said activities would not have been conducted by him but for the specific and/or implied authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel, laches and/or fair play to maintain this suit against your Defendant and/or obtain the relief requested.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

(a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

(b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violation of the statutes upon which Plaintiff relies in this Second Amended Complaint.

(c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.

(d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.

(e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.

(f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits, the purpose of which is to subject your Defendant to severe emotional stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

(g) That your Defendant is upon information and belief that the Second Amended Complaint heretofore exhibited against him is a continuation of the afore-

said conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.

(h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the Second Amended Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your defendant intends to rely upon the defenses of immunity from prosecution and in support thereof would specifically allege as follows:

(a) That on the 2nd day of April, 1982, this Court entered an Order at the request of Plaintiffs, granting to Defendant immunity from prosecution.

(b) That the penalties sought by the Plaintiff herein are criminal and/or quasi-criminal in nature, notwithstanding that Plaintiff seeks to assert that the said penalties are civil in nature.

(c) That by reason of the aforesaid immunity from prosecution your Defendant may not be prosecuted by Plaintiff and/or subject to the relief sought by Plaintiff in its Second Amended Complaint.

8. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery and/or at trial in this case.

WHEREFORE, your Defendant, having hereinabove set out his Grounds of Defense to the Second Amended Complaint heretofore exhibited against him, respectfully prays that the Second Amended Complaint be dismissed

together with his costs in including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

By /s/ Edward Lunn Tull
Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nagoette, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

vs.

EDWARD LUNN TULL,
Defendant

[Filed Aug. 11, 1981]

DEMAND FOR JURY TRIAL

COMES NOW your Defendant, Edward Lunn Tull, by counsel, and pursuant to Federal Rules of Civil Procedure, Rule 38(b), demands trial by jury of all issues relied upon by Plaintiff in support of paragraph 2, 3 and 4 of Plaintiff's prayer for relief as contained in the Complaint heretofore filed.

Your Defendant would state as the grounds for his demand for trial by jury that the relief sought by paragraphs 2, 3 and 4 of the Complaint result in a money judgment are punitive and quasi-criminal in nature. That as a result thereof, your Defendant is entitled by the Constitution of the United States and case law binding the United States District Courts to trial by jury, all as is more fully set out in the Memorandum in Support of Demand for Jury Trial, which memorandum is attached hereto, incorporated herein and made a part of this Motion.

WHEREFORE, your Defendant prays that his Demand for a jury trial be granted and that all issues relating to prayers 2, 3 and 4 of the Complaint be tried by jury.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Sept. 10, 1981]

ORDER

This matter comes on upon defendant's motions (1) for a more definite statement, and (2) for a jury trial.

---

(1) We believe that the complaint alleges in sufficient detail that the defendant has discharged pollutants into waters of the United States by placing fill upon certain land near Chincoteague, Virginia, without having first secured a permit from the Secretary of the Army. The complaint is neither vague or ambiguous to the point that the defendant cannot reasonably be expected to recognize the charges and to answer. *Hodson v. Virginia Baptist Hospital, Inc.*, 482 F.2d 821 (4th Cir. 1973).

The motion for a more definite statement is DENIED.

(2) On the defendant's request for a jury trial, we find that the relief sought by the United States is, in

every instance, equitable in nature, or directives sought from the Court to-wit:

i. An injunction is sought against future violations.

ii. Restoration of the wetlands to their former, unspoiled, condition.

iii. Civil penalties to be assessed by the under 33 U.S.C. § 1311(a).

iiii. Costs of the action.

iiiii. Other relief as the Court may find necessary.

Clearly, the penalty under 33 U.S.C. § 1311(a) is a civil assessment and not a Sixth Amendment criminal sanction. *United States v. Ward*, 448 U.S. 242 (1980). Restoration of the premises, if applicable, is for Court direction. Costs and "other relief" are matters for the Court to assess.

The demand for jury trial is DENIED.

It is so ORDERED.

/s/ John MacKenzie
United States District Judge

Norfolk, Virginia

September 9, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81688N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Nov. 4, 1983]

PETITION

COMES NOW your Defendant, Edward Lunn Tull, by Counsel, and without waiving the issues contained in the Motion for a New Trial and/or the Defendant's right of appeal as to those issues, and petitions this Court for the relief hereinafter specified and in support thereof submits a Memorandum of Law in support of the relief prayed for in this Petition upon the following grounds:

1. This Court entered its written Opinion together with a Judgment Order on the 28th day of September, 1983.

2. The Judgment Order of this Court entered on the 28th day of September, 1983 in Paragraph (C) granted to the Defendant an election to pay, in the alternative, a fine in the sum of $250,000.00 or by election duly filed in writing in the Clerk's Office of this Court within ten (10) days from the date of the Order obtain a suspen-

sion of said fine on the condition that the Defendant, agree to restore, what the Court found to be, an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975.

3. By Order of this Court entered on October 6, 1983 the time granted to the Defendant to make the election contained in the Order of this Court entered on September 28, 1983 was extended to thirty (30) days from the date of the Order of October 6, 1983.

4. The Order of this Court entered on September 28, 1983 clearly intended to offer to the Defendant, an election but by reason of the unique factual situation of this case did not offer the Defendant an election for the following reasons:

a. The Order of September 28, 1983 clearly intended by implication that the defendant was to restore what the Court referred to as the extension of Fowling Gut to its former navigable condition as it existed between 1963 and November, 1975. This requirement infers that the restoration be along the exact same route that existed prior to filling.

b. The unrebutted evidence presented during trial of this case was that this filled area has been subdivided into mobile home lots which have been sold to third parties and there has been a valid recordation of a subdivision plat which binds the Defendant, to convey the streets which traverse across the filled area to the Commonwealth of Virginia for inclusion of the State's Secondary Roads System. Utilities have also been placed in this area to serve the mobile home lots sold to third parties.

c. This Court should take judicial notice of the fact that the Defendant, is a private citizen and as such does not have the power of condemnation and eminent domain.

4. For the reasons hereinabove set out and as your Defendant, does not have the power of condemnation and eminent domain it is impossible for him to guarantee to this Court within the time limits prescribed and/or within any time limit that he can reacquire all property purchased by third party purchasers and roads which he is obligated by law to dedicate to the Virginia State Secondary Roads System in order to take advantage of the election provided by the Court in Paragraph (C) of the Judgment Order entered on the 28th day of September, 1983.

5. Your Defendant believes that this Court genuinely desired to offer to your Defendant a true election and not an election that would be impossible to perform by the Defendant. Defendant therefore believes that the fact that this Court offered an impossible election results from the Court's inadvertent failure to consider that the property which would be necessary to be dug up in order to restore what the Court found to be Fowling Gut extended in its exact location prior to filling was property conveyed to third parties and obligations incurred by the Defendant to Accomack County and the Commonwealth of Virginia prior to institution of this suit. These conveyances which were entered into long before this suit was filed cannot be set aside and your Defendant cannot legally force a reconveyance to him of these properties.

6. Believing that this Court intended to grant to your Defendant a genuine election rather than a sham election which would be impossible to perform your Defendant if given additional time and the opportunity to do so can present to this Court an engineering plan to restore a similar area in a more Westerly direction over property owned by the Defendant, or which can be acquired by the Defendant, connecting the area to Fowling Gut at a more Southerly location. Such a plan would constitute a true election as it would be possible of performance by your Defendant and would accomplish the goal expressed by this Court in its Opinion and Order.

7. The relief sought by this Petition will not substantially alter or affect the Plaintiff's recovery in this case. Reopening of a water way connection as proposed by your Defendant would result in an area being dredged of the exact same dimensions which would connect to the same water way, i.e. Fowling Gut. The only variance from its original location would be that it would be moved approximately one hundred yards to the west and intersect Fowling Gut several hundred yards to the south.

WHEREFORE your Defendant, Edward Lunn Tunn, respectfully petitions this Court to grant the following relief:

A. That this Court enter an Order finding that the election offered by this Court in Paragraph (C) of its Order entered on September 28, 1983 is realistically impossible for your Defendant to perform.

B. Permit your Defendant within a reasonable time from the entry of the above Order to present engineering drawings to construct a connection between Fowling Gut and the southern terminus of the filled area which would offer the same interconnection at a differnt location.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

[Filed Jan. 5, 1984]

ORDER

This matter arises on the defendant's Petition for Relief from the final judgment entered by this Court on September 28, 1983. For the reasons set forth below, the defendant's petition is DENIED.

In this action involving the landfill of wetland property without the requisite permit, the defendant was directed to elect either to restore the extension of Fowling Gut to its prior condition or pay a fine in the amount of $250,000.00. By order of this Court dated October 6, 1983, the defendant was given an additional thirty (30) days to elect from the date of the order. On November 4, 1983, the day required for the defendant to make his election, the defendant filed the instant petition for relief.

The defendant alleges in the instant petition that restoration of the waterway is not possible unless this Court grants a variance as to the precise location of the reinstituted waterway. Specifically, the defendant requested that the original location be moved approximately one hundred yards to the west and intersect Fowling Gut several hundred yards to the south. The defendant requested that this Court enter an order finding that the election referred to above is realistically impossible and allowing the defendant to submit engineering plans that would permit the same interconnection at a different location. Subsequently, an oral hearing was held on December 16, 1983, approximately two and one-half months after entry of judgment and six weeks after the petition for relief were filed.

The defendant requested on November 22, 1983, that all of the many voluminous exhibits introduced at trial be readied for the oral argument indicating to the Court that the defendant would present some factual development. Alas, such was not the case. The defendant presented absolutely no evidence to substantiate the feasibility of his request nor any evidence to show that the Court's original order was impractical. He did not offer any engineering study or any biological evidence relating to the environmental impact of the proposed variance. No testimony was presented specifying the percentage of property currently owned by the defendant nor was testimony elicited as to the practicality of obtaining the necessary property from the present owners.

Rather, the defendant requested yet another additional thirty (30) day period in which to obtain an engineering report. This request was made even though the defendant had well over thirty days from the date the petition was filed to obtain such a report. The only justification offered for the defendant's failure to prepare the report prior to the oral argument was that he did not want to expend funds unnecessarily.

It is patently obvious to this Court that the present petition was inserted merely to gain further delay in an action already replete with multiple examples of pro-

tracted litigation. Accordingly, the Court, after hearing all the arguments, finds no basis to grant the petition nor to permit additional time to obtain further information. The Court, during a recess, even attempted unsuccessfully to contact the defendant's engineer to ascertain if the defendant's proposal had any credance.

Finding no reason to alter the Court's prior judgment, the Court hereby DENIES defendant's petition for relief. Further, the Court once again allows the defendant thirty (30) days from the date hereof in which to elect whether to restore the waterway or pay the fine.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

January 5th, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED SATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

MOTION FOR REHEARING

COMES NOW your Defendant Edward Lunn Tull, by Counsel, and in accordance with Rule 59(a) moves this Court for a Rehearing of Defendant's Petition for Relief from the Final Judgment entered by this Court on September 28, 1983, which Petition was denied by this Court by Order entered on January 5, 1984 upon the following grounds:

1. This Court entered its written Opinion together with the Judgment Order on the 28th day of September, 1983.

2. The Judgment Order of this Court entered on the 28th day of September, 1983 in paragraph (C) ordered the Defendant to pay, a fine in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) or by election duly filed in writing in the Clerk's Office of this Court within Ten (10) days from the date of the Order obtain

a suspension of the fine on the condition that the Defendant, agree to restore what the Court found to be, an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975.

3. By order of this Court entered on October 6, 1983 the time granted to the Defendant to make the election contained in the Order of this Court entered on September 28, 1983 was extended to Thirty (30) days from the date of the Order of October 6, 1983.

4. On November 4, 1983 the Defendant filed a Petition praying that this Court find that the election offered in paragraph (C) of its Order entered on September 28, 1983 is realistically impossible for the Defendant to perform and to permit the Defendant within Thirty (30) days to present engineering drawings to construct a connection between Fowling Gut and the southern terminus of the fill area which would offer the same interconnection at a different location.

5. An Oral Hearing was held by this Court on December 16, 1983 and an Order was entered by this Court on January 5, 1984 denying Defendant's prayer for relief for the reasons stated in the Order. At this hearing Defendant's Counsel showed the Court on the trial exhibits the approximate location of the proposed alternative route and advised the Court that the proposed waterbody would have exactly the same cross-section upon completition as the existing waterbody.

6. Subsequent to the Hearing held by this Court on December 16, 1983, Defendant's Counsel reported to Defendant the position of the Court at which time Defendant authorized Defendant's Counsel to proceed to obtain the necessary engineering drawings notwithstanding the substantial expense involved and the possibility that this Court would not further entertain Defendant's Petition.

7. Immediately after the intervening holiday season on January 6, 1984, Defendant's Counsel met with Defendant and Defendant's engineer, Ronald Beebe, at the property on Chincoteague, Virginia for the purpose of clearing areas of underbrush in order that the exact location of the proposed alternative could be staked upon the ground and drafted into detailed engineering drawings.

8. Upon returning to his office in Woodbridge, Virginia on Saturday, January 7, 1984, Defendant's attorney found in the mail the Order of this Court entered on January 5, 1984. On Sunday, January 8, 19[illegible] Counsel telephoned both Defendant and Defendant's Engineer requesting that the plan be expedited in order that it could be filed with this Court.

9. As will be seen from the enclosed Affidavits, Defendant's Petition was not filed for the purpose of delay but was filed in good faith with the express intention of following through and providing a genuine election to the Defendant the original election being impossible of performance.

10. No delay or prejudice to the litigants will result as jurisdiction continues to rest in this Court pending ruling on Defendant's Motion for a New Trial, which Motion cannot be determined until such time as the trial transcript is completed. The official Court Reporter has advised this Court that the transcript should be completed by March or April.

11. Defendant has demonstrated his good faith by expending substantial funds to obtain the engineering necessary to propose this relocation to the Court notwithstanding this Court's prior ruling.

12. As will be seen by the Affidavits attached to this Motion, restoration of what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 is impossible and far more expensive than the payment of a fine in the sum of Two Hundred and Fifty Thousand

Dollars ($250,000.00). It does not represent a genuine election to the Defendant. Restoration through the proposed alternative route does present a viable election to the Defendant and would provide the relief sought by the Plaintiff, United States of America. Accordingly refusal by the Court to consider the alternative restoration suggested by the Defendant would thwart the alleged purpose of the Plaintiff which was to seek restoration in favor of a punitive fine in the grossly excessive sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

13. Justice, fairness and equity support the granting of the relief prayed for herein.

WHEREFORE your Defendant prays that this Court grant his Motion for a New Hearing in accordance with Rule 59(a). Further that the Court upon consideration of the Affidavits and Counter Affidavits, if any, grant the relief requested and Amend The Judgment of September 28, 1983 to permit the Defendant to elect to restore what the Court found to be an extension of Fowling Gut to the location as shown on the engineering drawings submitted with this Motion. Defendant desires to state the reasons for granting this Motion orally, however, in view of this Court's belief that Defendant seeks to delay these proceedings, Defendant waives oral argument and consents to a determination on the Motion and attached Affidavits.

EDWARD L. TULL

/s/ Edward L. Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, VA 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL
Defendant

[Filed Jan. 12, 1984]

**AFFIDAVIT OF RICHARD R. NAGEOTTE,
ATTORNEY AT LAW**

COMES NOW Richarde R. Nageotte, Attorney at Law, Counsel for Defendant, Edward Lunn Tull, and after being first duly sworn states as follows:

1. That subsequent to the Opinion and Judgment Order of this Court entered on the 28th day of September, 1983 a great deal of time and effort was expended filing the Motion for New Trial and obtaining the necessary Bond. During these consultations with my client I determined that my client could not within Thirty (30) days make an election to restore what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 and post a performance bond in the sum of Three Hundred Thousand Dollars ($300,000.00) to ensure this restoration. My client could not guaranty that he could obtain all of the lots previously sold to third parties nor

could he ensure that he would be successful in obtaining approval from Accomack County and the Virginia Department of Highways and Transportation which would be required to modify a subdivision already approved and recorded and the road network located therein. Additionally, I determined that even if my client could ultimately obtain all of the property necessary and the approval of the governmental agencies that the cost to my client would substantially exceed the fine of $250,000.00 imposed by this Court.

2. During these consultations with my client, it was determined that my client had subsequent to the trial of this case purchased additional property south of and adjacent to the Ocean Breeze Subdivision. This property was designated as uplands by the United States during trial and would probably be acceptable both from an environmental and engineering position to be used as an alternative route for restoration. Restoration along this alternative route would be economically reasonable.

3. The suggestion to petition the Court for Relief and request that the Court permit an additional Thirty (30) days to make the necessary detailed engineering studies was my decision concurred in by my client, and was for the sole purpose of avoiding unnecessary expenditure of funds in the event that it was the position of the Court that no restoration other than along the exact same route would be acceptable. At the time I made this decision it did not occur to me that the Court would consider what I thought to be a reasonable approach to this problem as a tactic for delay.

4. At no time did I take this action for purposes of delay, nor did I even consider that the Court would perceive the filing of this Petition as a tactic for delay. It was, and is still my position, that no delay results because until such time as this Court rules on Defendant's Motion for a New Trial this case remains within the jurisdiction of the Trial Court and no delay will

result. It is further my position that when the Court considers the Trial Transcript together with the Motion for a New Trial, the Court will determine that numerous errors exist in the Opinion and Findings of the Court which will substantially effect the Judgment entered in this case.

5. Immediately upon filing the Petition on November 4, 1983, I contacted Mrs. Michael Gunn, the Docketing Clerk of this Court, and attempted to have the Petition set for oral argument. Because of this Court's busy Trial Calendar the earliest date that could be obtained with the Agreement of all Counsel was November 22, 1983 and the hearing on the Petition was scheduled on that date. Subsequently I was advised by Mrs. Michael Gunn, the Docketing Clerk of this Court, that the case could not be heard on November 22nd because of this Court's conflicting schedule. At this time the hearing was continued to December 8, 1983. Because of a conflict either with the Court's schedule or other counsel, the case was again continued until December 16th, 1983 at which time the Oral Hearing was held. At the Hearing on December 16, 1983 I correctly represented to the Court the approximate location of the proposed restoration but advised the Court that I could not place the location exactly without the engineer's service. However, I did advise the Court that the physical dimensions proposed in the restoration would be exactly the same as those found in the existing waterbody and that only its location would be altered.

6 Upon hearing the Court's position at the Hearing on December 16, 1983, I advised my client and my client authorized me to proceed to obtain the necessary engineering services. Immediately after the holiday season I arranged to meet with my client and his engineer, Mr. Ronald Beebe, on the property on January 6, 1984, at which time the preliminary plan was laid out on the ground, survey lines were cleared and the feasibility study was conducted. When I left at 8:00 o'clock P.M.

on January 6th, 1983 to return to Northern Virginia, the engineer, Mr. Beebe, was to complete the engineering work, stake and flag the proposed location in order that it could be viewed by representatives of the Plaintiff, United States of America, and prepare final engineering drawings including location and cross-sections.

7. Upon return to my office on January 7th, 1984, I found in the mail this Court's Order of January 5, 1984. I immediately telephoned both my client and Mr. Beebe on Sunday, January 8th, 1984 and requested that this work be expedited.

8. Neither the original Petition or this Motion for Rehearing was or is done for any purpose other than to offer a viable election to my client and obtain the restoration sought by Plaintiff, United States of America. Justice, fairness and equity merit the consideration of the relief requested.

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM, to-wit:

Subscribed and sworn to before me this 9th day of January, 1984 by RICHARD R. NAGEOTTE.

/s/ Phyllis E. Danner
Notary Public

My Commission expires: 7-11-86

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelninck
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

AFFIDAVIT OF EDWARD LUNN TULL

COMES NOW EDWARD LUNN TULL, who after being first duly sworn states as follows:

1. My name is Edward Lunn Tull and I am the Defendant in this case.

2. Subsequent to the Opinion and Judgment Order of this Court entered on the 28th day of September, 1983 I consulted with my attorney. During these consultations with my attorney I determined that I could not within Thirty (30) days make an election to restore what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 and post a performance bond in the sum of Three Hundred Thousand Dollars ($300,000.00) to ensure this restoration. I could not guaranty that I could obtain all of the lots previously sold to third parties nor could I ensure that I would be successful in obtain-

ing approval from Accomack County and the Virginia Department of Highways and Transportation which would be required to modify a subdivision already approved and recorded and the road network located therein. Additionally, I determined that even if I could ultimately obtain all the property necessary and the approval of the governmental agencies that the cost to me would substantially exceed the fine of $250,000.00 imposed by this Court.

3. Subsequent to the trial of this case I purchased additional property south of and adjacent to the Ocean Breeze Subdivision which property was designated as uplands by the United States during trial. Restoration along this alternative route would be economically reasonable.

4. At no time did I take this action or request that my attorney take this action for purposes of delay.

7. As the Developer of Ocean Breeze Subdivision I am thoroughly familiar with land values and recent sales of lots both with and without trailers located in Ocean Breeze Subdivision.

6. On January 6, 1984 I accompanied my attorney through the Ocean Breeze Subdivision and placed the following listed evaluation on lots and, when applicable, trailers located upon these lots. It is my opinion that these values as of January 6, 1984 are as follows:

Lot	Land Purchase Cost	Trailer Purchase Cost	Total	
69*	12,000	Vacant	12,000	
68*	12,000	Vacant	12,000	
67	12,000	35,000	47,000	
66	12,000	20,000	32,000	
65	12,000	Trailer owned by people that rent lot (by month)	12,000	
64	12,000	Vacant	12,000	
63	.00	Vacant	.00	(1)
62	15,000	Vacant	15,000	
61	12,000	Vacant	12,000	

Lot	Land Purchase Cost	Trailer Purchase Cost	Total	
60	12,000	Vacant	12,000	
59	12,000	Vacant	12,000	(2)
58*	12,000	40,000	52,000	
57*	12,500	Vacant	12,500	
51*	12,000	13,000	25,000	
50)	all lots owned by			
49)	one person probably			
48)	could not be purchased			
47)	at any price 58,000.00	60,000	118,000	
46	13,000	Trailer owned by people who rent lot (by year)	13,000	
45	12,000	20,000	32,000	
44	12,000	Vacant	12,000	
43*	12,000	Vacant	12,000	
42*	12,000	Vacant	12,000	
34*	14,000	18,000	32,000	
33*	14,000	15,000	29,000	
32	15,000	Trailer owned by people that rent	15,000	
31	14,000	14,000	28,000	(3)
30	16,000	22,000	38,000	
29*	16,000	12,000	28,000	
28*	13,000	Vacant	13,000	
	392,500	307,000	699,500	
* Lots directly in original canal location	$153,500	$136,000	289,500	

Notes: (1) This lot not usable alone.
(2) Sold two years ago at this price.
(3) This lot and trailer sold one year ago for $28,000.00.

Of the above listed lots at the time of trial I testified that I owned only one lot, which is Lot 63, which I still own but have agreed to convey. Since the date of trial I acquired Lot 62, which I have agreed to convey. Except for Lots 62 and 63 I own no interest in any of the above numbered lots at this time or at the time of trial of this case and would be required to purchase these lots from third party owners in order to elect to make restoration as set out in this Court's Order entered September 28, 1983. I have no power of condemnation or eminent domain and cannot at this time state whether or not I

would be successful in re-acquiring all of these lots. However, if it would be necessary to acquire lots 47 through 50 I am virtually certain that these lots could not be purchased at any price. There may well be other lots which would not be for sale. The prices which I have set out in the above list are priced based upon an open market with a willing buyer and willing seller and these prices could substantially increase if lot owners became aware that I was absolutely required to purchase these lots.

7. If it were possible to purchase only those lots in the direct course of what the Court found to be an extension of Fowling Gut as it existed between 1963 and November 1, 1975, the lots in the above list set out in paragarph 6 wihch have an asterisk would be necessary. As the Court can see, the cost to obtain the land is $153,000, the improvement $136,000 for a total of $289,500.00. I must assume that I would be required to purchase the trailers located upon the lots as most of the sales which have occurred require the purchase of not only the lot but the trailer located on the lot. In addition to the expenditure of $289,500.00 in land and improvements acquisition costs, two drainfield lots would be eliminated at a cost of $60,000.00 and two additional drainfield lots would have to be provided at a cost of $60,000.00 for an additional expense of $120,000.00. Purchasing only those lots in the direct path of the restoration would leave the remaining lots on the above list contained in paragraph 6 above without road and/or utility access to those lots. My engineer, Mr. Beebe has advised me that to provide a bridge across a waterbody Forty feet wide to provide access at each street would cost from $75,000.00 to $100,000.00 for each street. There are three state roads and one non-state service road which would have to be crossed in order to provide access to the remaining lots. My engineer has advised me that I cannot be assured of county or state approval of a plan to restore along the original course of the waterbody as the

subdivision has been approved and recorded many years prior to this and such a change would require a substantial amendment to the plans. Purchasing only those lots in the direct right of way and providing the necessary acccess to the additional lots would cost a total of approximately $809,500. Purchasing all lots effected would cost a total of $709,500.00. Not only would either of these plans be substantially more expensive than the $250,000.00 fine imposed by the Court, but I could not possibly make an election within Thirty (30) days as I could not guarantee acquisition of the property or approval by the necessary governmental agencies.

8. Subsequent to the trial of this case, I acquired additional lands to the south of and adjacent to this subdivision which the government concedes are uplands. I have requested that my engineer, Mr. Beebe, prepare a plan to propose restoration of what the Court found to be an extension of Fowling Gut in an alternative location through an area conceded by the government to be uplands. My engineer, Mr. Beebe, has prepared such a plan and it is attached to his Affidavit. This plan would provide a true election to which I could perform at substantially less cost than the fine imposed.

9. I was advised by my attorney that the Court has taken the position that I have proposed this alternative restoration plan for the purpose of gaining delay in this case. Neither I nor my attorney have ever discussed the proposal of this plan as a means of delay and I do not seek to delay this case by proposing this alternative restoration plan. My sole purpose in proposing this alternative restoration plan is to obtain a true election and alternative to the payment of a fine in the sum of $250,000.00.

/s/ Edward Lunn Tull
EDWARD LUNN TULL

STATE OF VIRGINIA AT LARGE

COUNTY OF ACCOMACK, to wit:

Subscribed and sworn to before me this 11 day of January 1983 by EDWARD LUNN TULL.

/s/ Melvin E. Shepherd
Notary Public

My Commission expires: May 12 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

AFFIDAVIT OF RONALD BEEBE

COMES NOW Ronald Beebe, who after being first duly sworn states as follows:

1. My name is Ronald Beebe. I am the engineer for Edward Lunn Tull, the Defendant in this case.

2. Subsequent to September 28, 1983 and prior to November 4, 1983 I was consulted by Richard R. Nageotte, Attorney for Edward Lunn Tull and Edward Lunn Tull concerning the feasibility of restoring what the Court found to be an extension of Fowling Gut as it existed between 1963 and November 1, 1975 to an alternate location in the general area as I have precisely located it in the attached engineering drawings. During these consultations I advised both Mr. Tull and his attorney that in my opinion it would be very difficult, if not impossible, to make this restoration over its location as it existed prior to filling because of the necessity to cut through

three subdivision streets together with the utilities located therein and provide alternative access. Ocean Breeze Subdivision is a subdivision approved by Accomack County and the Virginia Department of Highways and Transportation which is recorded in the land records of Accomack County, Virginia. Any change to the original subdivision plan would require the approval of these governmental agencies. If it were possible to obtain the lots from third party purchasers to make restoration through the original course, it would be necessary to provide road and utility service to those lots cut off. Three roads which have been built to Virginia Department of Highway and Transportation secondary road standards and one service road would have to be bridged and utilities would have to be provided. It is my opinion that each bridge crossing could cost from $75,000.00 to $100,000.00 each. It is possible that some type of box culvert design might be acceptable at somewhat less cost, however, the crossing of any waterbody forty feet wide with a state approved system would be very expensive. At least two drainfields costing approximately $30,000.00 each would have to be eliminated as one drainfield lies directly in the route and the other would, upon completion of restoration, be within fifty feet of the water body thereby making it unacceptable under state standards. I advised both Mr. Tull and his attorney that in my opinion restoration over the alternative route which I have proposed on the attached drawings would be feasible.

3. Subsequent to December 16, 1983, I was again contacted by Mr. Tull and Mr. Nageotte and requested to do preliminary drawings and field work necessary to prepare an alternative restoration plan to connect what remains of the existing water body to Fowling Gut directly through an area which the United States has designated as an upland area without destroying any wetlands. On January 6, 1984 I met with Mr. Tull and Mr. Nageotte and after reviewing with them my preliminary plans we went

to the property and did the necessary preliminary field work. My survey crews cut vegetation to survey and stake an acceptable alternative location and I was directed by Mr. Nageotte to stake and flag this location for inspection by representatives of the United States. I was further directed to prepare detailed engineering drawings showing the exact alternative location together with cross sections of the existing waterbody and the proposed connecting waterbody. I have completed these detailed engineering drawings and they are attached to this Affidavit. The exact location has been staked and flagged and is available for inspection by representatives of the United States. It is my opinion as a professional engineer that the proposed alternative location will function the same as what the Court found to be an extension of Fowling Gut as it existed between 1963 and November 1, 1975 and will be of the exact same dimension notwithstanding that it will have two curves which did not exist in the original waterbody. It is my opinion as a professional engineer that this relocation can be constructed by the Defendant Mr. Tull at substantially less cost than $250,000.00. The dredge material will not be placed on any wetlands but will be placed on uplands and, in my opinion, no wetlands should be effected by this proposal.

/s/ Ronald L. Beebe
RONALD L. BEEBE
Professional Engineer

STATE OF VIRGINIA AT LARGE

COUNTY OF ACCOMACK, to-wit:

Subscribed and sworn to before me this 11 day of January, 1984 by RONALD L. BEEBE, Professional Engineer.

/s/ Melvin E. Shepherd
Notary Public

My Commission expires: May 12, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

[Filed Feb. 16, 1984]

ORDER

This matter arises on the defendant's motion to alter or amend the judgment of this Court entered on January 5, 1984, and on the defendant's motion for a rehearing of this Court's previous denial of Tull's petition for relief. *See* Rule 59 Fed.R.Civ.P. For the reasons stated below, both motions are DENIED.

Originally, judgment was entered in the above-styled action on September 28, 1983 directing the defendant to elect either to restore the extension of Fowling Gut to its prior condition or pay a fine in the amount of $250,000.00. By order of this Court dated October 6, 1983, the defendant was given an additional thirty (30) days to elect from the date of the order. On November 4, 1983, the day required for the defendant to make his election, the defendant filed a petition for relief. After hearing oral argument, the Court denied the petition for relief from January 5, 1984.

Now, the defendant seeks a rehearing on this denial of his petition for relief, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. Rule 59(a) applies to requests for a new trial, and as the defendant previously filed on October 7, 1983 a motion for a new trial, this present motion for a rehearing will be treated as a motion for reconsideration of the denial of the defendant's petition for relief, rather than as a second motion for a new trial.

A motion for reconsideration, although not permitted by the Federal Rules of Civil Procedure, is common in federal practice. A motion for reconsideration is proper where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. *Above the Belt, Inc.* v. *Mel Bohannan Roofing, Inc.*, No. 83-0202-R (E.D. Va. September 1, 1983) (unpl. op.). A further basis for a motion to reconsider a prior decision would be a controlling or significant change in the law or facts since the submission of the issue to the Court. *Id.* The granting of a motion for reconsideration is rarely warranted, and, here, the defendant has presented no basis for this Court to alter its previous decision.

Essentially the defendant argues that he has no true election because the cost of restoring Fowling Gut to its original condition theoretically would exceed the $250,000 fine imposed. In support of this contention, an engineering study completed by Ronald Beebe sketching an alternative method to restore the water channel at less cost than $250,000 was filed. Further, Tull submitted an affidavit detailing the possible costs involved in obtaining the necessary property currently owned by various third parties if the restoration was completed as the Court directed. Tull stated, "Purchasing all lots effected would cost a total of $709,500. Not only would either of these plans be substantially more expensive than the $250,000 fine imposed by this Court, but I could not possibly make

an election within thirty (30) days as I could not guartee acquisition of the property or approval by the necessary governmental agencies." Lastly, an affidavit by Tull's attorney, Richard R. Nageotte, was submitted basically reiterating his client's position.

Nothing contained in this supplemental information inclines this Court to alter its previous ruling. The Court never guarantees that any election to restore would be less expensive than the fine imposed. Nor is the Court persuaded by the affidavits presented that the cost of restoration as directed would be prohibitively expensive. Additionally, Tull contends he could not make a proper election in thirty (30) days. The defendant appears recalcitrant in taking any action to further such an election. The initial court order directing an election was entered on September 28, 1983, a period of well over four months. Certainly, Tull has had a sufficient opportunity to investigate his alternatives by this time.

In conclusion, the Court finds that it understood Tull's contentions and based the decision denying the defendant's petition for relief on the basis of the adversarial issues presented to the Court at that time. Although the defendant at this late date offers some documentation of his alternative proposal, he has demonstrated no significant change in the law or facts arising since January 5, 1984, that would sway this Court. Accordingly, the defendant's motion for a rehearing is DENIED.

The Court will allow the defendant fifteen (15) days from the date hereof in which to elect whether to restore the waterway or pay the fine. Further, the Court admonishes the defendant that absolutely no additional extensions of time in which to make such an election will be awarded. The Court will not reconsider this decision absent extreme extenuating circumstances.

Next, the Court will discuss the defendant's motion to alter or amend the judgment entered on January 5, 1984, stating, "it is ordered and adjudged that defendant's petition for relief from the final judgment entered by

this Court on September 28, 1983 is DENIED." The instant motion was filed on January 11, 1983, well within ten (10) days of the January 5 entry of judgment. As such, the motion was filed in a timely fashion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

In accordance with the language of Rule 54(b), a trial court's judgment on less than all the claims presented is not final and appealable where the Court does not make an express determination that there is no just reason for delay nor an express direction for entry of judgment. In this case, a pending motion for a new trial filed on October 7, 1983 cannot be decided until a transcript is completed. Therefore, at least one issue remains to be resolved. As the Court has issued no determination or directive as referred to in Rule 54(b), the entry of judgment in question which admittedly adjudicates fewer than all the claims presented does not terminate the defendant's right to a decision on his motion for a new trial or permit any immediate appeal. The order is deemed subject to revision at any time before the entry of judgment adjudicating *all* claims, and as such, is not a final appealable order. The time for appeal in the instant action will run from the date of decision of the last pending motion filed, in this case that would be the date of this Court's decision on the motion for a new trial. Accordingly, the Court hereby DENIES the defendant's motion to alter or amend the judgment of January 5, 1984.

In conclusion, the Court DENIES both the motion for a rehearing and the motion to alter or amend a judgment. Only a motion for a new trial is pending at this time.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

February 16th, 1984

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

September 22, 1982 through September 28, 1982

* * * *

[1461] It goes to the remedy?

MISS DONLEY: Yes; it goes to the remedy.

THE COURT: All right.

MISS DONLEY: Normally this kind of case would be—

THE COURT: Just so I can ask you a question—

MISS DONLEY: Yes, sir.

THE COURT: Certainly Mr. Tull can't remedy what he's already sold.

What's the power of this Court to order somebody else who is not a party to this suit?

I can't take their property and dig a canal through their trailer park.

MISS DONLEY: We will be offering a restoration plan, too, but it's important to consider the loss to the ecology of the wetlands that have been filled in evaluating what the remedy should be, and it's what's been done in all the other cases that I am aware of—is to—

THE COURT: Well, I just want you to know I'm not about to cut out somebody's land that has been sold by Mr. Tull,—

MISS DONLEY: Very well, Your Honor.

THE COURT: —so you will understand that.

MISS DONLEY: Very well, Your Honor.

THE COURT: There is no way I can do it [1462] constitutionally, but—

The only thing you can cut open is what—

You show Mr. Tull—

If he's filled in wetlands contrary to the law, and you show this, we can make him unfill his own land; but we can't make him unfill somebody else's land.

MISS DONLEY: The United States in the restoration plan that they are going to present to this Court will not require—

THE COURT: That's assuming you win that you are going to present it to the Court.

MISS DONLEY: We—

The way this case is set up we must present it at this trial,—

THE COURT: All right.

MISS DONLEY: —unless Your Honor orders otherwise, because this is not a bifurcated trial.

THE COURT: All right. You go ahead, Miss Donley.

I just wanted to make sure I knew where we were going.

* * * *

[1737] MR. NAGEOTTE: And the ditch is not part of the case, Your Honor. I don't know why—

THE COURT: As far as I'm concerned, it's a very integral part of the case.

You may not consider it a part of the case. I consider it a part of the case.

Now, I thought we were talking about all of Ocean Breeze.

MR. NAGEOTTE: No, Your Honor. No, Your Honor.

THE COURT: We're not?

MR. NAGEOTTE: No.

THE COURT: Why not?

[1738] MISS DONLEY: We—

THE COURT: You keep calling it a ditch.

MR. NAGEOTTE: No, Your Honor. What we're talking about in this case are the wetlands.

THE COURT: We're talking about the wetlands; the navigable waters of the United States.

MR. NAGEOTTE: Your Honor, now—

No; we're not, Your Honor. We're talking about the crosshatched areas on—

THE COURT: We better be talking about the navigable waters of the United States, because if we're not I don't have any jurisdiction.

MR. NAGEOTTE: Your Honor, the ditch isn't part of the case.

The crosshatched areas—

THE COURT: It is a big part of the case, as far as I'm concerned, and I'm going to tell you that, and I'm not fooling anybody.

I'm considering all facets of this case.

I don't know if you called it a ditch. I found it's 40 feet wide, six feet deep.

What is that?

You know, I went down the Inland Waterway, and at spots it isn't 40 feet wide and six feet deep.

I got problems.

[1739] Is it not a part of this case, Miss Donley?

MISS DONLEY: It is a part of this case, Your Honor.

THE COURT: All right.

MR. NAGEOTTE: Now, wait a minute. Wait a minute.

If it is a part of this case, then I'm entitled to know what part of this case it is, Your Honor, because I was advised in pretrial that the part of this case was the filled wetlands which are carried in the crosshatched areas.

THE COURT: Well, I don't know. Maybe they consider the river,—

MR. NAGEOTTE: Well—

THE COURT: —whatever it might be, that it's not a—

Well, I'm not going to get into that.

You're saying that you feel you are taken by surprise about the ditch?

MR. NAGEOTTE: Well—

THE COURT: You didn't know the ditch was there?

MR. NAGEOTTE: Well, I'm not sure what she means when she says it's a part of the case.

If it's a part of the case because it may—

THE COURT: All right.

Well, Mr. Hume, perhaps you better step outside

[1740] before we contaminate you with all of this argument.

We'll just contaminate ourselves, Mr. Hume.

(At this point in the proceedings the witness retired from the courtroom.)

All right. Now, let's go, Mr. Nageotte. What's your objection?

MR. NAGEOTTE: Well, my objection, Your Honor, is that I have been led to believe throughout this case that the case concerns the crosshatched areas which are purportedly filled wetlands. It doesn't—

There is no complaint being made here concerning this ditch, and if what she's saying is the ditch—

THE COURT: Well, maybe she well is.

What is the situation with regard to the dtich, Miss Donley?

MISS DONLEY: We have filed a complaint for violations of 33 USC 1311, which is the discharge of any pollutant into navigable waters of the United States.

We've also included in Claim 4 any adjacent navigable waters.

We—

THE COURT: What is the statute of limitations on this?

MISS DONLEY: There is no—

The cases, the decided cases, indicate there is [1741] not a statute of limitations, because this is a continuing violation. It comes into the category of a continuing violation.

MR. NAGEOTTE: Well, now, to that, Your Honor, I want to tell Your Honor that I am shocked. I'm distressed. I'm surprised.

We took discovery in this case, and I asked them what the violations were. We went all through this, and that was never once said to be a violation.

The violations were specified to be the crosshatched areas, and I can't come in here and try a case and find out that somebody is alleging a new violation because

Your Honor hapened to pick up on it someplace along the way in the evidence, and I think that's what's happening, and I am prejudiced, Your Honor. My client is prejudiced.

And Miss Donley is misrepresenting to this Court what the facts of the discovery and what this case started out to be, what it went through discovery to be, and what it came into this court to be tried to be.

THE COURT: All right, Miss Donley. You have heard Mr. Nageotte say it was his understanding or that he was told this was not a violation or led to believe that burying that canal or ditch or river, or whatever it was, was not a violation.

[1742] MISS DONLEY: He was not led to believe that it was not a violation, Your Honor.

THE COURT: What was he led to believe?

MR. NAGEOTTE: Well, not—

THE COURT: Just a minute, Mr. Nageotte. I'll handle that.

MR. NAGEOTTE: In this case, Your Honor—

THE COURT: Mr. Nageotte, I'll handle it.

You are not to examine Miss Donley. I am.

Miss Donley, what was the situation?

In all candor and fairness, what did you indicate to Mr. Nageotte?

MISS DONLEY: When we initially filed the litigation,—

THE COURT: Yes.

MISS DONLEY: —we had not been allowed on the property at that time. The United States Government representative had not been allowed on the property.

THE COURT: I'm not asking all that. I'm asking what were—

What did you indicate to the defendant and to Mr. Nageotte were the violations with which he could be charged with answering?

MISS DONLEY: We talked to him about the wetlands.

We talked to him about discharging pollutants into [1743] navigable waters.

I can see now that Mr. Nageotte, from what he said—that his interpretation was that if a person discharged fill—

THE COURT: All right. Let me ask you a question.

Is Section C—

Did you ever put that in the hatched area?

I don't see any hatches on Section C.

Am I to understand if it's not on a hatched area Mr. Tull—

Is that your position?

MR. NAGEOTTE: That's my position, Your Honor, and that's what we—

THE COURT: So, we don't have to worry—

He can go ahead and fill Section C and sell it even if it's under water; is that right?

MR. NAGEOTTE: Well—

THE COURT: Is that your position?

I want to find out if that's your position.

MR. NAGEOTTE: Well—

THE COURT: Forget the waterway a minute. I'm now concerned about Section C.

It wasn't shown on the hatched areas?

MR. NAGEOTTE: Your Honor, it wasn't shown on the hatched areas, but it was specifically added by agreement of the—not necessarily agreement, but—

[1744] THE COURT: What agreement?

MISS DONLEY: There wasn't an agreement.

MR. NAGEOTTE: Miss Donley—

MISS DONLEY: It was an amended complaint.

THE COURT: An amended complaint?

MR. NAGEOTTE: Amended complaint.

MISS DONLEY: There was an amended complaint, and Mr. Nageotte responded to the amended complaint.

MR. NAGEOTTE: And that didn't have anything about the waterway on it, Your Honor, and I asked—I asked—

THE COURT: Was the section which contains the waterway through it part of the Ocean Breeze's complaint?

MISS DONLEY: Yes. It was Ocean Breeze. Ocean Breeze Section B.

THE COURT: I don't know what to do with it concerning—

Right now we're just going to listen.

MISS DONLEY: It's part of the original complaint.

THE COURT: It's not part of any other suit?

MISS DONLEY: No; it's not part of any other suit.

THE COURT: The Army Engineers—did they decline to take any action with regard to it?

MR. NAGEOTTE: Yes, sir.

THE COURT: Is that what this testimony is to show?

MISS DONLEY: This testimony is to clarify—

[1745] THE COURT: I can't know what it's going to say until we hear the testimony.

I'm going to hear the testimony.

What is your motion in relation to this, Mr. Nageotte?

MR. NAGEOTTE: Your Honor, my motion is any evidence concerning the ditch is not relevant because it's not a part of this case.

THE COURT: All right. In that case, I will listen to what—

Now I'm placed in a position where I have to listen to determine what the Army Engineers said that would tend to mislead Mr. Tull and Mr. Nageotte. So, we'll go ahead and listen to it.

If it shouldn't be, we'll dismiss it all and we won't consider it, Mr. Nageotte.

I don't know what they—

They must have—

Bring Mr. Hume back in here and let's get on with it. Let him tell us about this.

If it shouldn't be considered, we'll strike it all, Mr. Nageotte. That's all I can tell you, but I have got to

hear it to know whether it is or is not material, unfortunately.

* * * *

[1935] MISS DONLEY: —and the possible remedy in this action.

THE COURT: And who else?

MISS DONLEY: And then the person about the photograph.

MR. KANE: To identify that last photograph I used,—

MISS DONLEY: The last photograph.

MR. KANE: —the Bunker Hill photograph.

THE COURT: All right. You have got Mr. Tull, which I estimate is going to take almost a half a day, almost three quarters of a day, knowing Mr. Nageotte's going to get every nickel he can in your case. So, I would say it would be close to a day on Mr. Tull alone.

That's just my guess.

All right. Now I know where we're going.

I don't see any great problem.

The last question is: Can we settle this case?

Mr. Nageotte, you can't think of any way you could settle this case?

It's going to cost your client a ton if he loses. If he loses,—I'm not saying he is, but I'm just going to say if he loses—it's going to cost you a ton.

Now, the government—

[1936] You've got some real hurdles to overcome.

Remember the burden is on you-all, and you might not be able to prove certain things.

You just might not be able to prove it.

No need being adamant. If you can get yourself some wetlands back, I'd try to grab 'em and go.

MR. NAGEOTTE: Judge, I can honestly say again whatever penalty Your Honor would—

Even if my client lost this case, whatever penalty in your wildest dreams you could impose would not be worse than what the government wants,—

THE COURT: All right.

MR. NAGEOTTE: —and in those facts, Your Honor, there's hardly any way to settle.

THE COURT: All right. In that case—

I can't believe that,—

MR. NAGEOTTE: Well—

THE COURT: —because I am a mean, onery old soul. You just haven't seen me.

MR. NAGEOTTE: Well—

THE COURT: I believe in the government getting back money, Mr. Nageotte,—

MR. NAGEOTTE: Well—

THE COURT: —and the way I can get it to 'em—I'm better than the Internal Revenue Service. I can tell you [1937] that.

I pay a lot of taxes, and I don't have many deductions in this job. I'm finding that out quickly.

I used to have a lot of 'em in that old job.

MR. NAGEOTTE: Well, I hope Your Honor's position won't affect your thinking in this case.

THE COURT: I'll try not to make it affected to much.

* * * *

[2203] Q And how many times have you developed some sort of mitigation or restoration plan—

A Several hundred.

Q —at these locations?

A Several hundred.

Q Have you been—

Are you familiar with the sites in this suit?

A Yes; I am.

Q Do you have a rough concept of the acreage, for example?

A Yes; I do.

Q Knowing what you know about the fill activities that have been engaged in on these sites, do you believe it's possible to develop a restoration plan for these sites?

A Yes; I do.

Q Would you explain the general process of developing a restoration plan?

A Well, after reviewing the actual unauthorized activity—

MR. NAGEOTTE: I'm going to have to object here, Your Honor.

THE COURT: Well, how is this admissible?

How is his idea of a restoration plan admissible? [2204] Under what theory?

I'm confused.

MISS DONLEY: Your Honor, when—

Normally when—

Normally these cases are heard as bifurcated cases, but when they are not—

THE COURT: What you are saying is, since you claim that areas that were filled are now in the hands of third parties, and in an equity court it would be impossible to return 'em to the condition they were in, that some other plan must be utilized?

MISS DONLEY: No, Your Honor.

We believe that Your Honor certainly would have the authority to require the properties that are actually the subject of this litigation—to have those returned to wetlands if Your Honor required it. However, —

THE COURT: You mean—

MISS DONLEY: —we also—

THE COURT: You mean to say you think I would tell somebody who has a trailer out there: "You have the trailer, but, unfortunately, we're now going to dig up everything. We're going to leave the sewer line there and the water line there, and you can put your trailer up on stilts"?

MISS DONLEY: Your Honor, what I said was that the United States believes that you have the authority to do that. [2205] Whether Your Honor would do that is another question.

THE COURT: Where do you find that any Court has that authority?

MISS DONLEY: Because the United States' position is—

THE COURT: Forget the United States' position.

Where does the due process to a current owner of the lot come in?

MISS DONLEY: The current owner of the lot would have an action against the developer for the damages that had been caused to him.

THE COURT: We would be taking something away from the current owner, then, wouldn't we?

Shouldn't he be entitled to have his day in court?

* * * *

[2239] MR. NAGEOTTE: Your Honor, at this time I would move for a directed verdict and summary judgment for the defendant upon the following issues and upon the following grounds—

First, Your Honor, I would like to move for a directed verdict and summary judgment on behalf of the defendant with respect to any claims concerning the drainage ditch through Ocean Breeze, which is on a number of the government's exhibits, on the following grounds—

If I may refer, Your Honor, to the complaint in this case, the complaint in this case concerns Ocean Breeze [2240] in Count 1 of the complaint.

Count 1 of the complaint, Paragraph 10, if I may refer to that and read it to Your Honor, states that:

> "Defendant owns and/or controls"—that is Paragraph 8—"real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively."

Paragraph 10 of the complaint specifically sets out as follows—and this is the amended complaint I'm reading from:

> "Commencing on or about September 28, 1977, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs 8 and 9 above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above."

If I can refer, Your Honor, to the government's [2241] evidence in this case, which at this point in time must, as Your Honor is well aware, be taken in the light most favorable to the government, there is no evidence put before this Court by the government in its case in chief that Mr. Tull or anyone acting for or on behalf of Mr. Tull placed any fill material into what Your Honor refers to as the canal and what I refer to as the drainage ditch.

THE COURT: Mr. Tull, himself, said he put it in there.

MR. NAGEOTTE: Not after September 28th, 1977, Your Honor,—

THE COURT: Good point.

MR. NAGEOTTE: —and that's what's alleged in the complaint, and that's what we're joined on the issues for in this case. It's after September 28th, 1977.

I would refer Your Honor to Government's Exhibit—

And may I come up and show Your Honor which—

THE COURT: You don't have to. Just refer to it.

MR. NAGEOTTE: Government's Exhibit 29 is one of them, and the other one is—

And I get these—

THE COURT: All right. What is 29?

MR. NAGEOTTE: 29 was the aerial photograph used by Sipple to designate—

THE COURT: What you are saying is this canal was [2242] filled in prior to September, 1977, is that correct?

MR. NAGEOTTE: Not only that, Your Honor, but it is clearly shown on Exhibit 29, and also on, I believe, either Government's Exhibit 1—

If I could come up there, I could show Your Honor better, but these two exhibits are clearly dated September 28, 1977.

THE COURT: There isn't any question about Government's Exhibit 1. It's shown there, and Mr. Tull did fill it.

There it is.

There you go.

MR. NAGEOTTE: And that photograph shows it completely filled, and the date of that photograph is September 28, 1977.

That's Government Exhibit 1 and 1-A.

THE COURT: That's correct.

MR. NAGEOTTE: And Government Exhibit 29, Mr. Sipple's photograph, aerial photograph, shows precisely the same thing, Your Honor.

THE COURT: I think the evidence is fairly clear that the major portion, if not all, of the fill that was put into that ditch that I found was 40 feet wide and roughly six feet deep was done prior to September 28, 1977. The major portion of it certainly was done prior to September 28, [2243] 1977, in accordance with the evidence here.

MR. NAGEOTTE: If that's the case, Your Honor, we submit that with respect to that particular part of the case it should go out on the directed verdict or motion for summary judgment.

THE COURT: What's your next argument, sir?

* * * *

[2279] THE COURT: All right, Miss Donley.

Tell me about the drainage ditch, Miss Donley. How does it fit under the complaint?

He called it a drainage ditch.

That ditch is 40 feet wide and six feet deep. It's just a little bit bigger than the Dismal Swamp Canal.

Tell me about that ditch that he filled on.

[2280] Why is it that you can complain about it right now?

MISS DONLEY: Your Honor, initially, several points I'd like to make about the drainage ditch.

THE COURT: Well, start with that point, because I'm going to follow the way Mr. Nageotte raised the points.

MISS DONLEY: Yes.

THE COURT: Now, how can you complain about that under the pleadings?

MISS DONLEY: The pleading in Paragraph 10 says:

"Commencing about"—

We didn't—

We used a different characterization—

THE COURT: Let's be frank about it. The situation is that in 1977 anybody looking at any aerial photograph would have known that ditch had been filled in.

Is that correct?

MISS DONLEY: Yes.

THE COURT: All right.

Now, what is your position with regard to the drainage ditch?

MISS DONLEY: The evidence that we have put into this case—

My first point was the fact we used "Commencing about".

The evidence we have put into this case so far [2281] indicates that the drainage ditch was filled roughly 1976, late 1975.

THE COURT: That's about right.

MISS DONLEY: Under Rule 15(b), we can move at anytime to have the pleadings conform to the evidence whenever it makes substantial justice.

THE COURT: All right. Is that what you are moving to do?

MISS DONLEY: Yes, because it is already in evidence in the case.

THE COURT: All right. We'll consider that.
Move on to your next point.

* * * *

[2324] PROCEEDINGS

THE COURT: Good morning.

I'm sorry I am a little late. I had a little sentencing this morning that created a problem. It took a little longer than we thought.

Now, first, I am going to reopen the plaintiff's case and allow the plaintiff to reopen her case. I'm going to grant leave to the plaintiff to amend as to Count 1, that is, as to the Ocean Breeze allegations.

Insofar as Count 1 is concerned, I'm going to allow the amendment of the pleadings in relation to Ocean Breeze to amend to allege the filling of the alleged canal, drainage ditch, or Fowling Gut, whatever one calls it.

In relation to that, I think that the defendant ought to be given a fair opportunity to answer that portion, and, therefore, I am going to continue the matter with regard to allegations concerning Ocean Breeze and sever Ocean Breeze from this trial.

We will continue on with this trial with regard to Mire Pond and Eel Creek, that is, Counts 2 and 3, as well as Count 4, but we will not continue on this trial with regard to Ocean Breeze, but we're going to set it down immediately for trial—

Would you get Mrs. Gunn in here? [2325] —as to that particular count, and we will proceed to do that.

I'm sorry, but I feel that in relation to this canal—to me, it becomes patently obvious, especially in relation to the remaining testimony, that it should be reconnected; that, whatever it's called, it presents a serious question whether it should or should not, and I haven't heard any defendant's evidence at this time, and I don't want to say anything, but the ends of justice—and I find that the ends of justice—would best be served by allowing the amendment.

I'm not going to put Mr. Nageotte to the problem of having to answer it today. So, we're going to set a trial date right now for it, however, and it's going to be very short.

I'm going to move this thing to a conclusion,—

THE LAW CLERK: She's coming.

THE COURT: —if I possibly can.

All right, Mr. Nageotte. Do you want to say—

I saw you moving.

Did you want to say something about it?

MR. NAGEOTTE: Yes; I do, Your Honor.

THE COURT: All right.

MR. NAGEOTTE: Before I say anything, Your Honor, I would like a clarification on Your Honor's ruling.

[2326] Your Honor said you were going to sever all of Count 1, and we have witnesses coming today to testify to other areas of Count 1.

THE COURT: Well, I'll be glad to hear that. I'll accommodate you on that part, but I just don't want to—

I'll be be glad to hear all of that so you don't run into any problem.

I don't want to punish you in any way, and I am not trying to, and I don't want to force your hand in any way.

I'll be glad to accommodate you in any way possible. I want to be fair to you, but I don't want to start going—

I don't want to put this whole case off because of this matter.

MR. NAGEOTTE: At that point, then, Your Honor, I would have to again move for a mistrial in this case upon the—

THE COURT: Well, Mr. Nageotte, I won't hear your evidence, then, if that's what you want me to do.

You know, I am trying to accommodate you. I'll accommodate you any way you want to be accommodated.

Now, if you don't want me to hear the evidence, I won't hear the evidence. If you want me to hear the evidence, I will hear the evidence. But I won't have you moving for a [2327] mistrial because I'm accommodating you.

MR. NAGEOTTE: No, Your Honor.

THE COURT: Do you understand what I'm saying?

MR. NAGEOTTE: That's not the grounds for my motion.

THE COURT: Oh, excuse me.

MR. NAGEOTTE: With all due respect, sometimes Your Honor predetermines what I'm going to say.

THE COURT: All right.

MR. NAGEOTTE: I'm not moving for a mistrial on the fact that Your Honor is accommodating me by hearing other evidence other than the canal, the drainage ditch, with respect to Ocean Breeze.

I'm moving for a mistrial at this time on the basis that it's clear to me from what has occurred in this case that Your Honor has taken upon yourself to try certain aspects of this case which were not originally a part of the case or part of the pleadings. I feel it can only come as a result of Your Honor's view. Since the view Your Honor has been very clear that this drainage ditch, which has not—which no evidence was presented concerning—

There has been no evidence—no witness testified—concerning the drainage canal being a violation.

I had done great discovery in this case, and I have all the discovery here. This morning I have been through it. [2328] I would like to point out to Your Honor in my original interrogatories in this case I specifically asked the government what their claims were, what they claimed jurisdiction over, what they claimed violations to be.

My interrogatory—

THE COURT: I will instruct the government to further amplify those interrogatories, Mr. Nageotte,—

MR. NAGEOTTE: Well, Your Honor—

THE COURT: —within 10 days.

MR. NAGEOTTE: Your Honor—

THE COURT: I'll give 'em two weeks, because 10 days might end up eventually two weeks, anyhow.

Two weeks from today.

Okay. What else, Mr. Nageotte?

MR. NAGEOTTE: Well, I would like to put this on the record, Your Honor. I think it's—

THE COURT: I want you to put it on the record.

MR. NAGEOTTE: My Interrogatory 8, 9 and 10—I'm sorry.

Interrogatory 7, 8 and 9 went into specific details, asking the government to specify the areas of their jurisdiction and their complaints and claims in this case. In each instance they—while their answer was not fully complete, it alleged filling of marshlands. It specifically addressed fililng of marshlands. As a result of the [2329] incompleteness of the answer, I went before Judge MacKenzie on a motion to compel, and my motion to compel on those interrogatories—

Excuse me, Your Honor. It's Interrogatory 6, 7 and 8.

6, 7 and 8 are the interrogatories I'm addressing in this motion.

My motion to compel was filed within a few days of the 18th of March, 1982.

I don't have the exact date it was filed. That was the date I mailed it.

A hearing was held on this before Judge MacKenzie on April the 2nd, 1982, and I have a transcript of that hearing, and with regard to my Interrogatories 6, 7 and 8 Judge MacKenzie said that I would be provided that information in depositions of the government witnesses, and that area in the hearing transcript starts on Page 28 and runs forward.

As a result of Judge MacKenzie's ruling, I took the depositions of all government witnesses who the government indicated in their response to interrogatories had any knowledge concerning the allegations that were the subject of this case. In not one of those depositions did

any witness allege that this canal or drainage ditch that Your Honor has focused on from the day of your view in this case was an [2330] issue in this case. Their pleadings didn't make it an issue.

Your Honor, this Court has made it an issue, and as far as the government was concerned, from the plaintiff's side of the case, irrespective of Miss Donley's representation, when she observed during trial that Your Honor was focusing on this as an issue, she made it an issue at that point.

Now, a defendant has a hard enough time in any trial to defend against the charges brought against him without the trial Court coming up with charges or coming up with complaints that the government, itself, did not want to bring.

Now, with all due respect to Your Honor—and I must say I personally admire Your Honor very much, and it's very difficult to say this on the record, but in fairness to my client I must—Your Honor has a tendency in this trial to jump to conclusions on little evidence, and that's exactly what's happened here. Your Honor has jumped to a conclusion about this drainage ditch. You have focused on this. You have spent much time focusing on this issue that was a nonissue in the pleadings and in the case until Your Honor focused on it, and now Your Honor has gone so far as to, in effect, make it a part of the government's case when the government didn't originally make it a part of its own case, and this creates a grave problem when the trial Court becomes [2331] involved in effecting the pleadings in the case, of bringing up and putting issues in the case that were not originally in the case, when the government—

Then when the defense seeks to take those issues out of the case the Court brings them in by granting a motion to amend, made after a motion for directed verdict and summary judgment, not before, and reopens the plaintiff's case.

Your Honor, I would submit, has shown what I consider to be some very dangerous tendencies as far as being a neutral arbiter and Judge in this case.

Your Honor has in effect, accused Mr. Tull of lying on the witness stand or not telling the whole truth on the witness stand when there was no evidence to support it.

Your Honor made comments like if that proved to be incorrect Your Honor would reopen the trial; Your Honor would do this, and assess costs against him.

Your Honor has already gone into areas such as people who trucked to Chincoteague. Your Honor wanted to know all the people who trucked to Chincoteague in the last five years.

Now, I had a lot of problems with that and I objected to that at the time, Your Honor, and I could understand Your Honor's question. It would be a valid question if it had been related to these properties in issue, but it had no tie or relationship to these properties in [2332] issue.

Your Honor wanted to know everyone who trucked to Chincoteague in the last five years, and I know that Your Honor does not ask questions to waste time. Your Honor is constantly on the attorneys who ask questions that waste time. Your Honor had a purpose in this question, and Your Honor has got something in your mind about why you asked that question, and I don't know if Your Honor intends to tie this case into broad-sweeping issues of the entire Island of Chincoteague and what occurs there and that somehow this defendant is a part of that and this is a practice that has to be either crushed because it's not what the government wants or perhaps even, in all fairness, a practice that Your Honor considers wonderful because it provides employment in these economically hard times, but in either way, Your Honor, whether it's to the prejudice of the defendant or to the prejudice of the government, it's still to someone's prejudice. It expands the case beyond what the case is.

There's clearly a reason for it, and I would find it hard to believe that it would be to any benefit of the defendant and not to his prejudice.

Counsel has not had an opportunity to go out and determine if these are broad-ranging social-economic problems that affect the entire Island and what evidence we would have to put on if Your Honor has got thoughts about it, [2333] because Your Honor, as I said, did not tie it to any of these properties. It was just a broad-ranging question.

Your Honor has, with all due respect, many times during the trial heard a bit of evidence and then jumped to a conclusion.

Your Honor has done this in other areas, but particularly this concerns me about this canal.

Your Honor has even gone so far as to make statements that this is a serious, serious thing. You have not believed Mr. Tull when he's tried to tell you that that canal was blocked prior to his ever filling it, and if Your Honor really looks at the photographs I can show you where you can clearly see it was blocked. You can see it right on the photographs, and yet Your Honor made a thing—

Well, you go back to Chincoteague and you find out, and is Mr. Tull really telling the truth about that?

And yet I can show Your Honor right on the photographs where it's been previously blocked. You can see where the filling is fresh and new. You can see where the grass is growing over what used to be that canal.

I would submit to Your Honor the handling of this case to this point in the trial makes it clear to myself as a trial attorney that Your Honor has predetermined that you are going to find a violation by filling this drainage ditch even though it wasn't pleaded, even though it wasn't in [2334] evidence. Your Honor is going to force that in this trial, because Your Honor has decided, based on your view, that there's no question that that was water filled, and, therefore, Your Honor has decided that you're going

to do something about that, and I would submit to Your Honor that you have so taken over the case with respect to this drainage-ditch issue from the standpoint of the government that Your Honor can no longer sit in this trial and be an independent arbiter and an independent Judge that can render a fair and impartial decision to both sides.

Your Honor is now clearly on the side of the government with respect to this drainage-ditch issue, and, no matter what evidence is come up with, Your Honor is not going to change your mind or change your thinking about it, and that's a significant issue, Your Honor, because you have made statements from the bench that Mr. Tull still owns roads, roads that are paved, roads that are obligated to be turned over to the state highway system. Your Honor said, well, you could run that canal down the road and make him put expensive bridges up; you could run that down the drainage ditch. He doesn't own the drainage ditch. He owns perhaps an easement in it, but he doesn't own the ditch, and it's clear to me that Your Honor is so steadfast in your determination that you're going to find a violation on this canal even though none was alleged, and you're going to make [2335] him do something about it, and Your Honor just said it again, —you're going to get that open somehow—and, Your Honor, I submit at this point in the trial you clearly—clearly—can no longer hear this trial and render a fair and impartial verdict for the defendant.

And on that grounds, Your Honor, I say that the motion for a mistrial is extremely well taken.

THE COURT: All right.

Now, so, you are making a motion for a mistrial on the basis that you feel that what the Court has seen may have predetermined this issue.

I haven't predetermined the issue.

I'll put it for the record.

However, if you want to bring something to my attention, I want to see it. I always want to see any evidence.

You said something about you could see it clearly blocked. All you have to do is refer to the exhibit number. I'll be glad to consider it.

Now, what is the exhibit number you are referring to, sir?

MR. NAGEOTTE: May I get it from the Clerk, Your Honor?

THE COURT: Yes, sir.

MR. NAGEOTTE: I looked at it this morning. I don't [2336] know the number without looking at it.

By the way, Your Honor—

THE COURT: I just asked to get the picture.

MR. NAGEOTTE: I understand, but I'm telling Your Honor these photographs—

The government sticker was put over the date on these photographs, and we have agreed to put the dates where someone can read them so you know what dates the photographs were taken.

THE COURT: Just refer to the exhibit number.

MR. NAGEOTTE: Yes, sir.

THE COURT: I'll be glad to look at the picture.

MR. NAGEOTTE: It's Exhibit 45, Your Honor.

It was 46, but that was scratched out and it's Exhibit 45, and you can clearly see where the fill is, and you can clearly see where the green areas are grown across the canal, which indicate it was an old fill or old blockage.

MISS DONLEY: The date of the photograph is in the pretrial order. It's August, 1976.

THE COURT: The date of this photograph?

MISS DONLEY: Yes,—

THE COURT: All right.

MISS DONLEY: —if that is Number 45.

THE COURT: I have looked at the photograph.

The motion for a mistrial is denied.

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

May 27, 1986

No. 85-1259

EDWARD LUNN TULL

v.

UNITED STATES

The petition for a writ of certiorari is granted. Limited to Question 1 presented by the petition.

No. 85-1259 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the defendant in a civil action instituted by the Government in a Federal District Court to recover substantial civil penalties (in this case penalties sought were in excess of $22,000,000 and penalties received were in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

PARTIES

The parties are listed in the caption to this case. No other individuals or corporations are parties.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the District Court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610, and the judgment order (Pet. App. 64a-66a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1985. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of six to five on October 30, 1985. A revised order denying the petition for rehearing and suggestion for rehearing

en banc was entered on November 4, 1985, with four judges dissenting. Pet. App. 28a-29a.

The petition for writ of certiorari was filed in this Court on January 24, 1986 and granted on May 27, 1986. J.A. 134. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED

The Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. § 1251, *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers, are reprinted at Pet. App. 75a-81a. Rules 38(a), (b) and (c) of the Federal Rules of Civil Procedure are reprinted at JA 133.

STATEMENT OF CASE

The Government initiated this case by filing a three-count Complaint in the United States District Court for the Eastern District of Virginia on July 1, 1981, alleging in all three counts that Petitioner Tull had violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The case primarily concerned Tull's filling activities several years earlier. Tull filled the properties in question, subdivided the properties and sold the lots. The factual allegations necessary for the Government to prove its case as alleged in the Complaint were as follows: Tull owned the respective properties (Pars. 8, 14, 20); there were wetlands on the properties, and these wetlands were waters of the United States (Pars. 9, 15, 21); Tull discharged fill materials into the wetlands on these properties (Pars. 10, 16, 22); the Secretary of the Army has not issued a permit for the filling (Pars. 11, 17, 23); and the filling without a permit constituted violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), (Pars. 12, 18, 24).

Only the factual allegation that Tull had not received a permit for filling the properties was admitted by Tull.

All of the other factual allegations were denied, thereby placing them in issue for trial. While the Complaint filed on July 1, 1981, sought injunctive relief, the Government knew that the property had been sold by Tull to others before the Government brought the case and that injunctive relief was unlikely if not impossible. The Government did not aggressively pursue its prayer for injunctive relief.[1]

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[1] THE COURT: Certainly Mr. Tull can't remedy what he's already sold.

What's the power of this Court to order somebody else who is not a party to this suit?

I can't take their property and dig a canal through their trailer park.

MISS DONLEY [representing the United States]: We will be offering a restoration plan, too, but it's important to consider the loss to the ecology of the wetlands that have been filled in evaluating what the remedy should be, and it's what's been done in all the other cases that I am aware of—is to—

THE COURT: *Well, I just want to know I'm not about to cut out somebody's land that has been sold by Mr. Tull,—*

MISS DONLEY: Very well, Your Honor.

THE COURT: There is no way I can do it constitutionally, but—

If he's filled in wetlands contrary to the law, and you show this, we can make him unfill his own land; but we can't make him unfill somebody else's land. [J.A. 110 (emphasis supplied).]

* * * *

THE COURT: Well, how is this admissible?

How is his idea of a restoration plan admissible? Under what theory?

I'm confused.

MISS DONLEY: Your Honor, when—

Normally when—

Normally these cases are heard as bifurcated cases, but when they are not—

THE COURT: *What you are saying is, since you claim that areas that were filled are now in the hands of third parties, and in an equity court it would be impossible to return 'em to the condition they were in, that some other plan must be utilized?*

MISS DONLEY: No, Your Honor.

We believe that Your Honor certainly would have the authority to require the properties that are actually the subject of this liti-

Counts One and Two of the Complaint alleged violations which had occurred a number of years earlier. Count One charged a violation for the filling of Ocean Breeze Mobile Home Subdivision and Ocean Breeze Mobile Home Subdivision Section "B" which contained 208 mobile home lots, with each lot approximately 5,000 square feet. Appendix in the Court of Appeals ("Cir. Ct. App.") 1419-20. The Complaint alleged that this filling was done between September 29, 1977, and November 14, 1980. JA 31. The evidence proved that Tull had completed this filling in 1979. Pet. App. 38a-39a. Ocean Breeze Section "C", which contained only 5 lots, was added by amendment later in the case, and had been completed in 1980. Pet. App. 38a.

Count Two alleged a violation for the filling of Mire Pond I Subdivision, which contained 29 camper trailer lots, each lot approximately 1,900 square feet in size. Cir. Ct. App. 1418. The Complaint alleged that this filling

---

gation—to have those returned to wetlands if Your Honor required it. However,—

THE COURT: *You mean to say you think I would tell somebody who has a trailer out there: "You have the trailer, but, unfortunately, we're now going to dig up everything. We're going to leave the sewer line there and the water line there, and you can put your trailer up on stilts"?*

MISS DONLEY: Your Honor, what I said was that the United States believes that you have the authority to do that. Whether Your Honor would do that is another question.

THE COURT: *Where do you find that any Court has that authority?*

MISS DONLEY: Because the United States' position is—

THE COURT: *Forget the United States position. Where does the due process to a current owner of the lot come in?*

MISS DONLEY: The current owner of the lot would have an action against the developer for the damages that had been caused him.

THE COURT: *We would be taking something away from the current owner, then, wouldn't we?*

Shouldn't he be entitled to have his day in court? [JA 119 (emphasis supplied).]

was done between September 28, 1977, and November 14, 1980. JA 32. The evidence proved that Tull completed filling at Mire Pond I in 1978. Trial Transcript ("Tr.") 3442. All of the lots in Ocean Breeze, Ocean Breeze Section "B" and Mire Pond I which were the subject of Counts One and Two had been sold by Tull before the Complaint was filed. Only Count Three alleged a relatively recent violation. This alieged violation occurred in December 1980 (JA 33) and involved an alleged unlawful filling of one lot adjacent to Eel Creek. This lot, when filled by Tull, composed an area of approximately 12,000 square feet. Half of this property had been sold by Tull before the Complaint was filed, and Tull continued to own the balance of the lot until the case was decided. Pet. App. 47a. The only injunctive relief that flowed from the alleged violations contained in the Complaint was the court's order that Tull remove the fill from this 6,000 square-foot lot. Pet. App. 65a. Over 1,000,000 square feet of land was the subject of the Government's Complaint, and the Government obtained injunctive relief relating to only 6,000 square feet, or less than one percent.

The Government's Complaint demanded a civil penalty of $10,000 per day for the alleged violations that had occurred many years before (JA 34) and the imposition of potential civil penalties of $11,415,000 for the days of violation alleged in Count One (JA 31), $11,415,000 for the days alleged in Count Two (JA 32), and $60,000 for the days of violation alleged in Count Three. JA 33. The total potential civil penalties sought by the Government in the Complaint were thus $22,890,000.

The Government did not seek a temporary restraining order for any of the violations alleged in the Complaint. Nor would such an injunction have been appropriate, since, as noted, most of the property had been filled many years before, and all of the property had been sold,

except for half of the lot at Eel Creek. The Government was well aware that virtually all of the property had been sold to third parties, in some cases as much as five years prior to the Government's Complaint in July 1981. In fact, the Government introduced into evidence a list of the lots, the date that some had been sold, and copies (some incomplete) of some of the Deeds. Exs. 22a and 22b; Tr. 1575. None of these third parties to whom Tull had sold the improved land was named in the Complaint as a party. As the Government knew and the trial court pointed out, injunctive relief under these facts was impossible. *See supra* n.1.

The Government had been aware of Tull's filling activities at all of these properties while they were being filled. Numerous aerial photographs taken by the Corps of Engineers of the filling at Ocean Breeze and Ocean Breeze Section "B" were introduced into evidence. Cir. Ct. App. 1261-67, 1372, 1373, 1426-27, 1436-46. The district engineer and his staff made an on-site inspection in July 1976. Cir. Ct. App. 663-696. The development and filling of Mire Pond I were photographed and documented by a Corps of Engineers inspector, and the photographs introduced into evidence. Cir. Ct. App. 1421-25. Even the small lot next to Eel Creek was photographed by the Corps of Engineers, as it was being filled in December of 1980, and these photographs were also introduced by the Government. Cir. Ct. App. 1258-1260. The Government's delay in commenc[ing] civil action for appropriate relief, including a permanent or temporary injunction * * *," as permitted by 33 U.S.C. § 1319(b), betrays the extent of its alleged interest in that relief. Except for the small lot owned by Tull at Eel Creek, all of the equitable relief prayed for by the Government in the Complaint and permitted by the Clean Water Act was moot at the time of the Complaint.

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Tull demanded a "trial by jury of all issues

relied upon by Plaintiff in support of the relief prayed for in paragraphs 2. (restoration), 3. (civil penalties) and 4. (costs) of Plaintiff's prayer for relief." JA 33. Tull concedes now and did at the time of his jury trial demand that while the Government's prayer for an injunction, Prayer 1, was essentially moot at the time the Government filed the original complaint, Tull had no right to demand a jury as to equitable relief. Tull asserted in his jury trial demand that the predominant relief sought by the Government—civil penalties—would result in a money judgment that would be punitive in nature and that the Constitution and case law mandated a trial by jury. JA 78. Tull's memorandum in support of his jury trial demand stated that the Government's Complaint contained mixed issues of equity and law and that only the first prayer for relief alleged equitable jurisdiction, while prayers 2, 3, and 4 were for legal relief. Tull further asserted that prayer for relief 3, in particular, which sought civil penalties for $10,000.00 per day, was a prayer for legal relief in the form of a money judgment. The memorandum argued that Tull was entitled to a jury trial under the Seventh Amendment even though legal and equitable relief were combined in the same case, citing *Ross* v. *Bernhard*, 396 U.S. 531 (1970), as authority. Tull also relied upon *United States* v. *Regan*, 232 U.S. 37 (1914), for his contention that trial by jury was required in a civil penalty case.

The District Court, by Order entered September 9, 1981, denied Tull's demand for a jury trial, stating, "the relief sought by the United States is in every instance equitable in nature, or directives sought from the Court * * *." JA 80. However, in its opinion, the District Court conceded that it had heard legal issues in the case. Pet. App. 59a.

Nearly seven months after filing its original Complaint, the Government amended it on January 22, 1982, to include an additional piece of property, Mire Pond II

(adjacent to Mire Pond I), which Tull was developing at that time. The trial court ultimately found that the filling had occurred at Mire Pond II since February 1982. Pet. App. 39a. The Government sought and received a temporary restraining order on May 7, 1982, as to this property, and Tull ceased filling it. Except for the allegations relating to this additional property, which were contained in Count Four, the allegations of the Amended Complaint were the same as the Original Complaint, and Tull's Answer to the Amended Complaint put in issue the same factual contentions for trial. JA 66. Trial began on July 28, 1982, with the District Court sitting without a jury. During the trial, after the government rested its case and Tull made a motion to dismiss and enter partial summary judgment, the District Court granted the government's motion to re-open and amend for the second time. JA 120-124. This amended complaint, filed October 22, 1982, duplicated the prior complaints, but extended the time period of the alleged violations and asserted for the first time a claim under the Rivers and Harbors Act of 1899. JA 60. Tull's Answer and Grounds of Defense denied the allegations and placed the same facts in issue as under the Clean Water Act. JA 66. The Rivers and Harbors Act does not provide for civil penalties. Pet. App. 76a.

During the fifteen-day trial, the Government presented the testimony of 16 witnesses and introduced 87 exhibits. Tull presented the testimony of 16 witnesses and introduced 46 exhibits.

Briefly, the trial evidence demonstrated that Tull is engaged in the business of developing residential properties on the island of Chincoteague, Virgina. In July 1976, Tull obtained advice from his engineer and his attorney to ensure that the proposed work would not encroach into the Corps of Engineers jurisdiction. Cir. Ct. App. 941. As an additional precaution, Tull requested a determination from officials in the Corps itself "to see if they had any objection to any work on any of the property there—

any of the filling of the property." Cir. Ct. App. 951-952. Pursuant to Tull's request, a jurisdictional inspection of these properties was conducted by the Corps' Norfolk District Engineer and his staff, which included the Chief of the Construction Operations Division, the Chief of the Regulatory Functions Branch, the Chief of the Waterways Inspection Branch, an employee of the Permits Branch, an employee of the Enforcement Division, and two Corps counsel. Cir. Ct. App. 663-670. The Corps counsel, whose duties included jurisdictional determinations (Cir. Ct. App. 663), confirmed that the express purpose of the inspection was to view the work ongoing at the sites in order to determine whether the activity was within the Corps' jurisdiction (Cir. Ct. App. 672) and was being carried on without a necessary permit. Cir. Ct. App. 709.

After being advised by the District Engineer that fill could not be placed at two locations, Tull proceeded with his plans as to the remaining properties. Cir. Ct. App. 518. He did not fill the areas where he was instructed that a permit would be required. Cir. Ct. App. 503-504, 719, 807, 838-839, 960, 962, 1383.

After the inspection, the Corps continued to monitor Tull's ongoing filling and construction activities by aerial inspections and photographs. Cir. Ct. App. 1142-46. These photographs demonstrated the progress of the work, which included pushing fill material into a drainage ditch (Cir. Ct. App. 1261, 1262, 1273, 1427, 1439-42), construction of utilities and roads (Cir. Ct. App. 1371-72) and, ultimately, the sale of the properties to third parties and the placement of trailers on the lots. Cir. Ct. App. 1265-67, 1446. These improvements were made at substantial expense to Tull. Cir. Ct. App. 1382.

At no time during the five years between the inspection and the filing of the Complaint in this case did the District Engineer issue a cease and desist order or any other notification that Tull's filling activity was unau-

thorized (Cir. Ct. App. 961-962), even though such notice is required by the Corps' regulations. 33 C.F.R. 209.120(g)(12) (1975) and 33 C.F.R. 362.2 (1977). Pet. App. 80a-81a.

In order to prove that the property at issue was in fact "wetlands" for which a permit was required before fill material could be placed upon it, the Government began by presenting the testimony of Richard Sumner. Sumner was the "field investigator" of Tull's property for the Environmental Protection Agency. Tr. 134. Sumner described how the EPA became administratively aware of Tull's activities on his property through a "formal request for assistance" from the Corps on September 17, 1980. He obtained historical photos covering the Ocean Breeze area and documents, narratives, memos and reports, prepared by the Army Corps of Engineers, describing in general terms these sites. Tr. 139-140. He testified to his opinion that there were areas of "wetlands" within Tull's property. Tr. 304. He developed the methodology upon which he reached that conclusion from the historical materials furnished him by the Corps and his inspections of the properties. Tr. 320. Sumner testified concerning various soil tests and mapping techniques which the Government used on Tull's properties. Tr. 231-233. On cross-examination, Sumner conceded that the location of certain test sample holes had been changed on key Government exhibits. Cir. Ct. App. 230-246. Thus an issue of the credibility of the Government's evidence was directly raised.

John Clay, a soil consultant, who had made reports in 1975 for the Accomac County Board of Health, testified as to the feasibility of septic fields being constructed at that time on portions of Tull's property. Tr. 920-922. The Government elicited Clay's opinion as to the status of Tull's property under the relevant Corps regulations defining "wetlands". Tr. 933-934. Clay's opinion was that the property contained tidal marsh, and yet he admitted on cross-examination that he had only been on

the property on one occasion for a period of one hour and had made no tidal studies. Cir. Ct. App. 302. At least the weight, if not the credibility, of Clay's testimony thus became an important issue.

William Sipple testified as an expert in photographic interpretation of environmental areas. Tr. 962. Sipple was a key Government witness, as his task had been to map the alleged wetlands areas and prepare key exhibits used by the Government at trial. Cir. Ct. App. 366. On cross-examination, Sipple admitted that on a key Government exhibit the extent of the wetlands was altered. so that on Tull's property wetlands were shown to be seventy feet wide, while on the property next to Tull's, they were shown to be only ten feet wide, even though the vegetation was the same. Cir. Ct. App. 1364-70.[2] Sipple's admission concerning the alteration of evidence raised an issue of credibility not only as to the witness, but also as to the wetlands/uplands maps which were the central mainstay of the Government's case.

Milton McCarthy, with the United States Department of Interior (Tr. 1697), Edward Christoffer, an employee of the National Marine Fisheries Service (Tr. 1697), Julian Hume, III, an employee in the Permit Section of the Army Corps of Engineers (Tr. 1731), Gerald Tracey, an environmental scientist employed by the Corps (Tr. 1773), and Alexander Dolgas, an employee of the enforcement section of the Corps (Tr. 2031), also testified for the Government in its attempt to establish what portion, if any, of Tull's property was "wetlands" under the definition contained in the Corps' regulations. Some witnesses testified that certain vegetation types were obligate (always found in wetlands) or faculative (found in wetlands and uplands). Cir. Ct. App. 225, 320, 638-640, 805-806. The Government's own employees from the Corps Permits Section, Hume and Williams, agreed that

[2] Sipple also testified concerning the classification of certain vegetation that is found in both uplands and wetlands. Tr. 977-978.

what constitutes "wetlands" under the regulatory definition is a judgment call (Cir. Ct. App. 775, 803) and that the experts differ. Cir. Ct. App. 776, 777.

After conflicting testimony of the Government's witnesses, the trial court retained its own expert, Professor Donna Ware. Pet. App. 41a. Ware opined that a portion of Tull's filled property was a wetland that had in the past been tidally influenced before being disrupted. Cir. Ct. App. 1188-89. Ware could not determine when this disruption occurred. Cir. Ct. App. 1189. Ronald Beebe, a civil engineer, testified on Tull's behalf. He testified that Tull's activities took place well above the mean high water mark, and that there was no tidal influence upon the property in issue. Tr. 2780. Beebe, a long-time resident of the area, testified that the property in question had been bermed for farming many years before, contained road beds, was used for grazing cattle and, in the past, had had an airfield on it. Cir. Ct. App. 814, 891-892, 1233.

In addition to the cross-examination of the Government's witnesses, Tull affirmatively presented the testimony of numerous witnesses to prove his contention that the property the Government alleged to be within the Corps' jurisdiction was in fact not "wetlands". For example, Dr. David Adams, a wetlands expert, testified that based on his investigation and after thirty to forty sample holes dug at Ocean Breeze, he concluded that the area was a complex system difficult to reconstruct with any precision. Cir. Ct. App. 626-635. Donald Turner, a sanitarian for the Accomac County Board of Health, testified that areas the Government exhibits showed as wetlands could not be wetlands, as they contained drainfields which are not permitted to be placed in wetlands. Tr. 2622-48, 2668-69.

After the fifteen-day trial, the District Court entered its Order and Opinion on September 28, 1983, assessing civil penalties and granting judgment for the Govern-

ment in the sum of $325,000.[3] The court made good an earlier promise that if the case could not be settled and Tull lost, he would lose "a ton."[4] Tull was *not* ordered

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[3] While the District Court gave Tull the option to avoid payment of $250,000 of the civil penalty by certain restoration work (Pet. App. 65a), it recognized during the trial that this was impossible, as Tull had long since completed the development and sold the lots to third parties. *See supra* n.1. Tull's petition to restore a drainage ditch in an alternative location based upon his affidavit that restoration in its original location was impossible because the property has been sold to others was denied by the District Court. JA 82-109.

[4] THE COURT: Mr. Nageotte, you can't think of any way you could settle this case? It's going to cost your client a ton if he loses. If he loses,—I'm not saying he is, but I'm just going to say if he loses—it's going to cost you a ton.

Now the government—

You've got some real hurdles to overcome.

Remember the burden is on you-all, and you might not be able to prove certain things.

You just might not be able to prove it.

No need being adamant. If you can get yourself some wetlands back, I'd try to grab 'em and go.

MR. NAGEOTTE: Judge, I can honestly say again whatever penalty Your Honor would—

Even if my client lost this case, whatever penalty in your wildest dreams you could impose would not be worse than what the government wants,—

THE COURT: All right.

MR. NAGEOTTE: —and on those facts, Your Honor, there's hardly any way to settle.

THE COURT: All right. In that case—

I can't believe that,—

MR. NAGEOTTE: Well—

THE COURT: —because I am a mean, ornery old soul. You just haven't seen me.

MR. NAGEOTTE: Well—

THE COURT: I believe in the government getting back money, Mr. Nageotte,—

MR. NAGEOTTE: Well—

THE COURT: —and the way I can get it to 'em—I'm better than the Internal Revenue Service. I can tell you that.

[Continued]

to remove the fill material from any of the 208 lots he had filled and sold in Ocean Breeze.[5] Tull was assessed a "penalty or civil fine" for filling at Ocean Breeze Mobile Home Sites in the amount of $35,000. Pet. App. 64a. For filling six lots at Mire Pond I and one lot at Mire Pond II, Tull received a "penalty or civil fine" in the amount of $35,000 (Pet. App. 64a), and for filling the lot at Eel Creek a "penalty or civil fine" in the amount of $5,000. Pet. App. 64a. Fill material was ordered removed from two upland lots at Mire Pond II as mitigation for filling Mire Pond I. Pet. App. 65a. After Tull's Motion for a New Trial was denied, Tull appealed to the Fourth Circuit.

The majority of the panel of the Court of Appeals, in a two-to-one decision, affirmed, finding no merit in Tull's claim that he had a right to a jury trial in this case." Pet. App. 8a. The majority held that "the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977); *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937)." The majority noted that Congress may constitutionally enact a statutory remedy unknown at common law, vesting fact-finding in an admin-

[4] [Continued]

I pay a lot of taxes, and I don't have many deductions in this job. I'm finding that out quickly.

I used to have a lot of 'em in that old job.

MR. NAGEOTTE: Well, I hope Your Honor's position won't affect your thinking in this case.

THE COURT: I'll try not to make it affected too much. [JA 117.]

[5] While the suit was pending, Tull platted an additional Section of Ocean Breeze which contained only 5 lots. This section, Ocean Breeze Section "C", had not yet been recorded or sold because of the pending suit. Some portions of these lots had been filled in 1980. The trial court ordered the fill removed from these lots unless Tull was granted an after-the-fact permit from the Army Corps of Engineers. Pet. App. 65a.

istrative agency or others without the need for a jury trial. Pet. App. at 8a. The majority further noted that "the Supreme Court has left open the question whether the Seventh Amendment has no application to government litigation at all," citing *Atlas Roofing*, 430 U.S. at 449 n.6. Moreover, "even assuming that the Seventh Amendment applies to government litigation, the fact that the government is suing to collect statutory penalties does not require a jury trial." Pet. App. 9a.

Judge Warriner dissented, objecting to the majority's analysis and application of this Court's precedents. He concluded that "since the remedies sought by the Government were both legal and equitable, and the district court may hear both at the same time * * * and the findings of fact necessary to determine what civil penalties, if any, would be adjudged are the same as those to be decided for the equitable remedies sought, the case should have been heard before a jury upon the defendant's demands." Pet. App. 25a.

Tull petitioned the Court of Appeals for a rehearing *en banc*. The petition was denied by a vote of six-to-five on October 30, 1985. Pet. App. 26a-28a. A revised order denying the petition for rehearing *en banc* was entered on November 4, 1985, with four judges dissenting. Pet. App. 28a-29a. This Court granted certiorari on May 27, 1986. JA 134.

SUMMARY OF ARGUMENT

Under the Seventh Amendment the right to trial by jury applies in all cases in which the value in controversy exceeds twenty dollars and "the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). The right to trial by jury in civil penalty actions instituted by the government was recognized as early as Magna Carta. Jury trial was a routine feature in civil penalty actions at the time the Seventh Amendment was adopted, and common practice thereafter. There have been many decided cases involving issues implicated by the right

to jury trial in penalty actions instituted by the Government, such as the appropriateness of directed verdicts and new trials, the burden of proof, whether such actions were civil or criminal, and so on. Significantly, no case held, or even inferred, that the jury trial right did not exist. To the contrary, in every case it was assumed to exist and constituted the very foundation of the Court's decision. It would be an extraordinary jurisprudential oversight if for almost two hundred years the jury trial right under the Seventh Amendment were suddenly discovered never to have existed in civil penalty cases.

The right to jury trial is not defeated simply because the statute provides for and the Government seeks equitable relief in addition to civil penalties. This Court has long recognized that the presence of equitable and legal claims in the same action cannot operate to defeat the right to jury trial on the legal claims. *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen* v. *Woods*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970). It would trivialize the constitutional protection of the right to trial by jury to permit the Government to avoid presenting its case to a jury by the simple expedient of appending a catch-all claim for such equitable relief as may be appropriate to any civil penalty action. The dangers of such a view are clearly illustrated by the present case. From the outset it was clear that the Government's interest in this litigation was the imposition of penalties to punish Tull, rather than any equitable relief. The question of equitable relief in this case was largely moot from the outset.

The right to trial by jury is particularly important in actions brought by the Government. Modern statutes provide for the imposition of civil penalties in amounts that can dwarf the amount of fines that may be imposed in a criminal case for which a jury is clearly required. Indeed, the cases holding that penalty actions were civil in nature assumed that a jury would still be interposed between the Government and the accused. The foundation

of those cases would be undermined were the right to jury trial now found to be inapplicable.

A citizen is most in need of the protection of a jury when sued by the Government, with its vast resources. It would be a strange doctrine that the Government may not take away the right to jury trial in a case between two private parties, but is free to do so when it itself is a party. Recognizing the right to jury trial in civil penalty actions in no way interferes with legitimate interests of the Government, since Congress is free in any case involving public rights to vest factfinding and initial adjudicatory responsibilities in an administrative agency, with no right to jury trial. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). Congress did not do so in this case, but rather invoked the jurisdiction of the District Courts for such responsibilities. In so doing, Congress triggered the protections of the Seventh Amendment. *Curtis* v. *Loether*, 415 U.S. at 195.

Contrary to the Government's assertion, there clearly were issues for a jury to decide in this case. Every factual allegation of the Government was contested by Tull, except for the allegation that the filling was conducted without a permit. The District Court made numerous findings of fact and weighed the credibility of witnesses, usurping the proper functions of the jury requested by Tull. A jury should also have been empowered to determine the amount of any penalties imposed on Tull, assuming it would have found that he violated the Act. The fact that the statute provides a range of penalties in no way disqualifies a jury from this function, since juries often are called upon to set fines, sentences, or damages within a broad range of permissible possibilities. A jury is peculiarly necessary in light of the awesome power that the civil penalty statutes would otherwise place at the disposal of a single judge. In this case, for example, the judge could have imposed penalties of over $22,000,000 on Tull. The sheer magnitude of this power calls for the interposition of a jury between the accusation and the

judgment, as provided in the Seventh Amendment. This would still reserve to the trial court, in appropriate cases, whatever equitable issues remained in the case.

I. There Was A Right To Trial By Jury In This Civil Penalty Action Because Such Actions Have Historically Been Viewed As Actions At Law

The Seventh Amendment provides: "In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." In this case, the civil penalties sought exceeded $22,000,000 and the civil penalties imposed were in excess of $300,000.[6] The question, then, concerns interpretation of the phrase "Suits at common law" in the Seventh Amendment.

In *Curtis* v. *Loether*, *supra*, this Court "gave broad scope to the entitlement to a jury trial in actions for the enforcement of rights provided by twentieth-century statutes." *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 424 (2d Cir. 1974) (Friendly, J.) This Court in *Curtis* held that the Seventh Amendment right to a jury trial applied to actions for damages under Title VIII of the Civil Rights Act, 42 U.S.C. § 3612, even though such actions did not, of course, exist in 1791 when the Amendment was adopted. As the Court noted, "although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of

[6] It is not necessary in this case for the Court to define the precise lower monetary limit on the right to trial by jury. In an appropriate case the Court could decide that the drafters of the Seventh Amendment intended the right to apply only in cases in which a significant amount was in dispute, and settled upon the twenty dollar figure as appropriate at that time to exclude *de minimis* disputes. Even if the Court were to consider a higher figure necessary in light of economic developments to effectuate this intent, it is clear that the present case—in which over $22,000,000 in penalties could have been assessed and in which over $300,000 in penalties were actually assessed—would easily surpass any conceivable limit designed to exclude *de minimis* disputes.

actions recognized at that time." 415 U.S. at 193. *See Parson* v. *Bedford*, 28 U.S. 433, 446-447 (1830). The Court reasoned that "a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." 415 U.S. at 195.

The question, then, is whether a civil penalty action "involves rights and remedies of the sort typically enforced in an action at law." Civil penalty actions brought by the Government have long been considered actions at law. Historically, the only controversy was whether such penalty actions were criminal rather than civil. It has never been questioned that when the Government institutes a suit for civil penalties, a jury is required upon demand.

The right of trial by jury in civil penalty cases first appears in the Magna Carta granted by King John in 1215 under threat of civil war. Actions to collect civil penalties or fines, called amercements,[7] were required by Magna Carta to be tried by a jury. Magna Carta provided:

> Amercements for slight offenses shall be in accordance with the measure of the offense. Amercements for serious offenses shall not be so heavy as to deprive anyone of his means of livelihood. *Amercements to be assessed by honest men of the neighborhood.* Earls and barons are to be amerced by their peers according to the measure of their offense. (emphasis supplied)

Even though the right of trial by jury was discarded in many civil actions in England, it was retained for penal statutes. *See* Mathew Hale, *The History of The Common Law* (4th ed. page 298).

Sixteen years before the enactment of the Seventh Amendment, in the case of *Atcheson* v. *Everitt*, 1 Cowper 382 (1776), the English court found it necessary to de-

[7] "AMERCEMENT. A pecuniary penalty, in the nature of a fine, imposed upon a person for some fault or misconduct, he being 'in mercy' for his offense." Black's Law Dictionary, 4th ed., p. 107.

termine whether a statute to recover a penalty attended with disabilities was a criminal or civil cause. A Quaker's testimony was not admissible in criminal cases because of his refusal to take the oath, but was acceptable in a civil cause of action. Thus, the question presented was whether a penalty action was a criminal or civil cause of action and, if civil, its nature. Lord Mansfield noted that there being no case in point, it is a material circumstance that actions for penalties are, to a variety of purposes, considered as civil suits. Justice Ashton believed them to be criminal. Lord Mansfield noted that penal actions were never yet put under the head of criminal laws or crimes. Such actions were considered as much civil actions as actions for money had and received. The court held that a Quaker's testimony on his affirmation was admissible because a civil penalty suit was an action in debt. *Id.* at 391. Such actions, of course, are legal, not equitable.

In *Calcraft* v. *Gibbs*, 5 Term. Rep. 19 (1792), the English court held that a new trial could be granted in a civil penalty case in which the jury found for the defendant, because the cause was an action in debt for a penalty. Accordingly, at the same time the Seventh Amendment was adopted in this country, English courts were trying civil penalty cases as common law actions in debt, with a jury.

From the enactment of the Seventh Amendment, our courts followed the common law of England, treating cases for civil penalties as actions in debt subject to trial by jury. In 1795, it was held that bail was not required in a civil penalty case because it was an action in debt. This case was tried by a jury. *United States* v. *Mulvaney*, Fed. Case No. 15,834.

In 1810, the United States filed an action in debt to recover a penalty of $20,000 under the Embargo Act. The jury in the District Court found against the defendant, but the court assessed the amount of the penalty.

The appeals court reversed, and one of the grounds of reversal was that the jury ought to have assessed the penalty. *United States* v. *Allen*, Fed. Case No. 14,431.

In 1821, the United States recovered a civil penalty in the amount of $500 and costs for violation of an act of Congress. The jury found its verdict in favor of the United States. However, the statute upon which the United States sued did not expressly set out the nature of the remedy. The court held that in such a case, an action in debt lies. *Jacob* v. *United States*, Fed. Case No. 7,157.

In 1854, the United States sued for a civil penalty imposed under a statute providing that the right to sue was limited to a person. In affirming the right of the United States to sue in such cases, the court held that it was a long settled principle of common law that an action in debt is maintainable to recover a pecuniary penalty imposed by statute, and when such a penalty is incurred by violation of a statute of the United States, it accrues to the Government and may be sued for in its name. The court, interpreting the 9th section of the Judiciary Act of 1789, 1 Stat. 76, declared that a civil penalty suit came under the provision that stated, "the court shall have cognizance of all suits *at common law* where the United States sues and the matter in dispute amounts, exclusive of costs, to the sum of $100.00." (emphasis supplied). Penalty actions, therefore, are suits "at common law" brought by the United States. *United States* v. *Bougher*, Fed. Case No. 14,627.

In 1871, this Court reversed a lower court holding that when the United States seeks a penalty based on an offense against law, it must be by indictment or by information. The Court held that "whether the liability incurred is to be regarded as a penalty or as liquidated damages for an injury done to the United States, *it is a debt*, and as such it must be recoverable in a civil action." *Stockwell* v. *United States*, 13 Wall. 531, 542 (1871)

(emphasis supplied). The case was tried to a jury, and the second assignment of error involved the instructions to the jury. The penalty sought was double the value of shingles alleged to have been illegally imported into the United States. Accordingly, the jury was required to ascertain the value of the shingles in order to double that value for purposes of imposition of the penalty. *Id.*

Three years later, in 1874, this Court again had occasion to hear a case involving instructions to the jury in an action brought by the United States to recover a statutory penalty. The case was an action in debt, to recover the penalty prescribed by the 48th section of the Revenue Act of June 30, 1864. The statute provided for a penalty of $500 or not less than double the amount of duties fraudulently attempted to be evaded. The jury was instructed that the Government need only prove that the defendants were presumptively guilty and the burden thereupon shifted to them to establish their innocence; if they did not carry that burden, they were to be considered guilty beyond a reasonable doubt. In reversing, this Court said, "the instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." *Chaffee* v. *United States*, 18 Wall. 516 (1874.)[8] *See also Lees* v. *United States*, 150 U.S. 476 (1893) ("Although the recovery of a penalty is a proceeding criminal in nature, yet in this class of cases, it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts"); *United States* v. *Zucker*, 161 U.S. 475 (1896).

[8] Proof beyond a reasonable doubt is no longer the standard in a civil penalty case, but *Chaffee* demonstrates that regardless of the standard of proof, cases seeking statutory penalties were viewed as triggering the "constitutional right of trial by jury."

As the foregoing decisions demonstrate, actions by the Government to recover penalties under statutory provisions have historically been viewed as actions in debt—common law actions requiring trial by jury.

It was against this background that the Court decided *Hepner* v. *United States*, 213 U.S. 103 (1909). The Court was asked by the Circuit Court of Appeals whether the trial judge could direct a verdict in favor of the Government in a case where there was undisputed testimony that a defendant had committed an offense against a Federal statute providing for a $1,000 civil penalty. In answering in the affirmative, this Court said:

> [T]he objection made in behalf of the defendant, that an affirmative answer to the question certified could be used so as to destroy the constitutional right of trial by jury, is without merit and need not be discussed. *The defendant was, of course, entitled to have a jury summoned in this case*, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law. Restricting our decision to civil cases, in which the testimony is undisputed, and without qualifying former decisions requiring the court to send a case to the jury, under proper instructions as to the law, where the evidence is conflicting on any essential point, we answer the question here certified in the affirmative. [*Id.* at 108.]

In *United States* v. *Regan*, 232 U.S. 37 (1914), this Court reversed what it termed "*an action of debt prosecuted by the United States*, under * * * the Alien Immigration Act, to recover $1,000.00 as a penalty for an alleged violation by the defendant * * *." *Id.* at 40 (emphasis supplied). The issue was a jury instruction relating to the burden of proof. This Court held that the instruction requiring proof beyond a reasonable doubt was incorrect because, "while the defendant was entitled

to have the issues tried before a jury, this right did not arise from Article III of the Constitution or from the Sixth Amendment, for both relate to prosecutions which are strictly criminal in their nature * * * *but it did arise out of the fact that in a civil action of debt involving more than $20.00 a jury trial is demandable.*" *Id.* at 47 (emphasis supplied).[9] *See also Chicago, Burlington and Quincy Ry. Co.* v. *United States*, 220 U.S. 559 (1911) ("as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize * * * the enforcement of such penalty by either a criminal prosecution or a civil action; and * * * if not directed otherwise, such [a civil] action is to be conducted and determined according to the same rules and with the same incidents as are other civil actions").

Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946), held that a court in equity had the power to order restitution of rents collected by a landlord in excess of the permissible maximum under Section 205(a) of the Emergency Price Control Act of 1942. The Court was careful to distinguish this restitution remedy from one for damages in the nature of penalties under Section 205(e) of the Act. Such penalty actions would have to be brought in a court of law rather than in a court of equity. 328 U.S. at 401-402.

More recently, in 1980, this Court held that the imposition of a civil penalty in the amount of $500 (reduced by the District Court to $250 after a jury trial) as a result of an oil spill report required under the Federal

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[9] The strong words used by this Court make it clear that given the issue presented, *i.e.*, a jury instruction concerning the burden of proof in a civil penalty case, the Seventh Amendment applies. We submit that this statement is more than *dictum* because it was made in the context of a jury instruction holding by this Court. If the Seventh Amendment did not require trial by jury in a civil penalty case, the Court would not have addressed the jury instruction issue, as it would have been moot.

Water Pollution Control Act, 33 U.S.C. § 1321(b)(5), was a civil penalty and not a criminal or quasi-criminal penalty. Therefore, the Fifth Amendment protection against self-incrimination in a criminal case did not apply. This case is significant because it was brought under a different section of the same statute as the instant case and was tried to a jury. *United States* v. *Ward*, 448 U.S. 242, 247 (1980).

As the above historical analysis makes clear, civil penalty actions have been in existence for over seven centuries. They were in existence when the Seventh Amendment was adopted, and had been clearly defined as common law civil actions for debt, and were tried by juries. Given this historical background, Judge Friendly concluded for the Second Circuit that the Government was "[n]ot * * * able seriously to dispute that an action to recover a statutory penalty generally carries the right to a jury trial." *United States* v. *J.B. Williams Co.*, 498 F.2d at 424.

II. The Fact That The Statute Provides Both Equitable And Legal Relief Cannot Defeat The Right To A Jury Trial

A. *The Historical Perspective*

The court below held that the Seventh Amendment did not apply to civil penalty actions because "the assessment of penalties intertwines with the imposition of traditional equitable relief." Pet. App. 9a. This Court has often held, however, that the mere fact that legal and equitable claims are joined cannot operate to defeat the right to jury trial. While the Federal judicial system has formally abandoned the distinction between equity and law and recognized a unitary civil action, this Court has consistently maintained the integrity of the constitutional mandate that legal issues in dispute in the Federal courts be tried by juries. *See Beacon Theatres* v. *Westover*, *supra*; *Dairy Queen* v. *Woods*, *supra*; *Ross* v. *Bernhard*, *supra*.

The mere fact that in this case the Government sought both injunctive relief and substantial civil penalties does not operate to deny Tull his right to have a jury try the Government's claim for civil penalties and the facts pertinent to their imposition. As this Court has steadfastly maintained:

> If the action is properly viewed as one for damages only, our conclusion that this is a legal claim obviously requires a jury trial on demand. And if this is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claims as "incidental" to the equitable relief sought. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500; *Dairy Queen, Inc.* v. *Wood*, 369 U.S., at 469, 470-473. [*Curtis v. Loether*, 415 U.S. at 196 n.11.]

To say that the Government's Complaint initiated an action in District Court that was equitable in nature would be factually and historically incorrect. Civil penalties were not part of the "remedies, procedures and practices" evolving from English Court of Chancery. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). This Court has consistently acknowledged that the phrase "suits in equity" refers to suits in which relief is sought according to principles applied by English Courts of Chancery before 1789. *Gordon* v. *Washington*, 295 U.S. 30 (1935); *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.*, 306 U.S. 563 (1939). As demonstrated above, suits for civil penalties were not tried in the English Court of Chancery before 1789, but were tried in the common law courts as actions in debt, with a jury. The civil penalties sought in this case were not an adjunct of, or incidental to, equitable relief; the so-called equitable relief was a catch-all remedy, almost wholly moot at the time of the action, that was itself incidental to the imposition of fines and penalties. If this action were sufficiently "equitable" to defeat a request for a jury, a jury trial

could be thwarted in *any* action for damages, fines, or penalties, simply by the addition of a conclusory request for an injunction.

Moreover, regardless of whether the injunction was incidental to the imposition of civil penalties, or vice versa, that is the wrong test. It is precisely the one rejected by this Court in *Dairy Queen, supra*, where this Court held that under *Beacon Theatres, supra*, entitlement to a jury trial "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." 369 U.S. at 473. *Cf. Stevens* v. *Gladdings*, 17 How. 448, 453-455 (1854) private claim for penalties not to be tried by equity court even when sought as one claim among a number that included injunctive relief and accounting for profits).

The court below considered a jury trial as to penalties inappropriate because the "district court fashions a 'package' of remedies, one part of the package affecting assessment of the others." Pet. App. 9a-10a. The same was true, however, in *Curtis* v. *Loether, supra*, and indeed is true in any case combining legal and equitable relief. In *Curtis* this Court recognized the right to a jury trial in an action enforcing statutory rights even though the statute provided a "package" of equitable and monetary relief. The statute at issue provided that the "court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorneys fees." 42 U.S.C. § 3612(c). The fact that equitable and legal relief were joined in this "package" did not prevent this Court in *Curtis* from upholding the right to jury trial.

In civil penalty actions in which the Government also seeks equitable relief, the legal issues must be tried to a jury and any equitable issues to the judge. There is noth-

ing unusual about this approach; it is the typical manner of handling any case in which legal and equitable claims are joined. *See Beacon Theatres, Inc.* v. *Westover, supra; Dairy Queen, Inc.* v. *Wood, supra.* Assuming that liability is found, the jury assesses the amount of civil penalties to be imposed, within the range provided by law, and the judge provides such equitable relief as may be appropriate. Again, there is nothing surprising or unusual about such a division of responsibility. It is simply an unexceptional consequence of preserving the Seventh Amendment right after the merger of law and equity.

B. *The Statute at Issue*

Nothing in the Clean Water Act or its legislative history implies any intent on the part of Congress to deny Tull his constitutionally protected right to a jury trial, simply because Congress provided a variety of remedies under the Act. The structure of the statute in fact refutes any such Congressional intent.

Section 1319 of Title 33, United States Code, sets out in three separate subsections the jurisdiction of the District Courts, corresponding to the equitable, criminal and legal duties imposed. The equitable jurisdiction of the District Courts is clearly provided in Subsection (b) of Section 1319, authorizing commencement of "a civil action for appropriate relief, including a permanent and temporary injunction, for any violation for which [the Administrator] is authorized to issue a compliance order under subsection (a) of this section." The Federal District Courts are given exclusive jurisdiction over such civil actions, and Section 1319(b) further provides that "such court shall have jurisdiction to restrain such violation and to require compliance." The enforcement provision provides for criminal sanctions in a separate subsection, 33 U.S.C. § 1319(c), and in another separate subsection, 33 U.S.C. § 1319(d), provides for the civil penalties at issue here. *See* Pet. App. 77a.

The Court of Appeals' holding that "the government is not suing to collect a penalty analogous to a remedy at law" (*id.*) is contradicted by the very structure of the enforcement provisions of the Clean Water Act. The provision for civil penalties found in 33 U.S.C. § 1319 (d) does not "intertwine with the imposition of equitable relief." Pet. App. 9a. It is instead a distinct and separate legal remedy which may be imposed in addition to or independent of equitable relief. Congress clearly did not provide that the civil penalties become "traditional equitable relief" or intertwined with equitable relief to be assessed in the discretion of trial judges. The Clean Water Act plainly separates the equitable relief the District Courts may provide in 33 U.S.C. § 1319(b), and the legal relief provided in 33 U.S.C. § 1319(d), which may, upon demand, be tried by a jury.

Had Congress intended civil penalties to be equitable relief assessable by trial judges alone, not only would the separation of the two distinct forms of remedies in separate subsections of the enforcement provisions have been inappropriate, but Congress would have specifically announced its intent in the statute and included within Section 1319(b) a statutory authorization for the District Court to assess civil penalties. As Judge Warriner noted in dissent below, "33 U.S.C. § 1319(b) provides for all usual equitable remedies to be available to the government * * *. The civil penalty of subsection (d) is another matter entirely." Pet. App. 25a.

By providing for each independent form of relief applicable under the statute in distinct and separate subsections, without expressing any intent that these remedies be enforced in other than the usual and traditional manner provided by the Constitution and the Federal Rules of Civil Procedure, Congress clearly did not intend, as the majority below believed, to abrogate the right to jury trial by granting the District Court the right to fashion a "package" of remedies. Under the majority's

analysis, Tull could also have been deprived of his right to a trial by jury under the Sixth Amendment had the Government, in addition, sought the criminal penalties provided in the statute. *See* 33 U.S.C. § 1319(c) (one year imprisonment for the first conviction and two years imprisonment for the second conviction). If the separate provisions for equitable relief in Section 1319(b) and legal relief in Section 1319(d) can be combined to grant jurisdiction to trial courts to fashion "packages" of remedies which intertwine with the imposition of traditional equitable relief, with the resulting loss of Seventh Amendment rights, then the logic of the majority's analysis would dictate that the criminal relief in Section 1319(c) could also be included in the "package" and similarly result in the loss of Sixth Amendment rights.

III. The Right To Trial By Jury Must Be Particularly Protected in Penalty Actions Brought By The Government

The Drafters of the Bill of Rights provided the protection of a jury trial in "all criminal prosecutions" under the Sixth Amendment, and in all suits at common law where the value in controversy exceeded twenty dollars under the Seventh Amendment. There is no evidence that they intended the Government to be able to avoid submitting its case to a jury when seeking to impose substantial civil penalties. Such a position would be devoid of logic. As this case demonstrates, the penalties imposed on an individual under a civil penalty statute can far exceed the fines that might be imposed under many if not most criminal statutes. Penalties in this case of over $22,000,000 were sought, and penalties in excess of $300,000 were actually imposed. It would be a strange doctrine that the protections of a jury trial would not be required under the seventh amendment when the government seeks millions of dollars in civil penalties, while a jury is required under the sixth amendment when the government seeks insignificant penalties in criminal cases.

Many of the cases discussed above addressed the question of whether a penalty action should be considered criminal or civil in nature. In the cases deciding that such actions were civil, the courts assumed that the right to a jury trial applied. *See, e.g., Calcraft* v. *Gibbs, supra; United States* v. *Mulvaney, supra; Stockwell* v. *United States, supra; United States* v. *Zucker, supra.* The whole question of classifying penalty actions as civil or criminal would need to be readdressed if the Government were correct that the basic protection of jury trial available in an ordinary civil action—were not available in penalty actions brought by the Government.

The Drafters of the Seventh Amendment preserved the right to trial by jury in civil cases as one of our basic liberties. It is the Government's position that this right does not apply precisely when it is most needed—when the Government itself brings an action against a citizen. Again, it would be a strange doctrine that a jury must be interposed between a citizen and judgment in an action brought by his neighbor, but not in an action brought by the Government, with its vast resources. The entire purpose of the Bill of Rights was, of course, to protect the liberties of citizens from encroachment *by the Government.* Under the Seventh Amendment, Congress cannot abolish the right to jury trial in private litigation in the Federal courts. Neither the language nor the history of the Seventh Amendment supports the bizarre reading that the opposite result obtains when the Government itself is a party.

Nor can it be maintained that the interposition of a jury between citizen and judgment in civil penalty cases will in any way interfere with important governmental interests. Congress is always free—in cases in which public rights are at issue—to assign the factfinding function and initial adjudication to an administrative agency, without any right to jury trial. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n, supra; NLRB* v. *Jones and Laughlin Steel Corp., supra.* If the

requirement of a jury trial in civil penalty actions would interfere with the efficiency of an administrative program, Congress is free to avoid the problem entirely by not invoking the jurisdiction of the District Courts. Having invoked that jurisdiction, however, the Government cannot argue that efficiency is an adequate reason for overriding the Seventh Amendment. The Amendment was adopted to protect liberty, not to promote efficiency.

Unlike the statutes applicable in *Atlas Roofing Co.* (factfinding by and penalties assessed in administrative hearing), *Jones and Laughlin Steel Corp* (reinstatement of employee with back wages as restitution by an administrative board), and *Republic Industries* (arbitration concerning amount of pension benefits), Congress did not choose in the Clean Water Act to vest fact-finding or the assessment of civil penalties in an administrative agency. To the contrary, Congress required that actions under the Clean Water Act be brought in the District Courts. This court in *Atlas Roofing*, 430 U.S. at 445, and *Curtis* v. *Loether*, 415 U.S. at 194, made it clear that when the applicable statute places jurisdiction for enforcement of legal remedies in the District Courts, a jury trial is required upon demand.

United States v. *J. B. Williams Co.*, *supra*, is closely on point. There, the Federal Trade Commission asked the Attorney General to seek civil penalties against a company for violation of a cease and desist order. In his opinion for the Second Circuit, Judge Friendly concluded that the company was entitled to a jury trial under the Seventh Amendment. He pointed out that while Congress *could* have granted the Commission itself the power to impose penalties, subject to limited judicial review, it had not done so. 498 F.2d at 430. Pointing to numerous lower court decisions, he stated that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the

discretion of the court * * *." *Id.* at 423 (footnote deleted). He concluded: "if in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later." *Id.* at 424-425. Like the statute at issue in *J.B. Williams Co.*, the Clean Water Act contains not a word of legislative history indicating that Congress intended for proceedings under the Act to be governed solely by equitable as opposed to legal principles, or for a jury trial to be denied. *Cf. Curtis* v. *Loether*, 415 U.S. at 192. Where the statute is silent, the result is clear.

IV. There Were Factual Issues For A Jury To Decide In This Case, Both As To Liability And Damages

There must, of course, be a function for the jury to perform for the Seventh Amendment right to apply. Contrary to the Government's assertion that there was no function for a jury to perform in this case, U.S. Br. in Opp. 8, the trial required findings of fact and weighing the credibility of witnesses and evidence. The critical issue in this case is whether a jury or the trial court should have made these findings of fact and judged the credibility of witnesses. The District Court, sitting without a jury, made at least nine clearly defined findings of fact and at least two critical determinations concerning the credibility of Tull's witnesses—disregarding their testimony—which affected the outcome of the case. Pet. App. 32a, 40a, 43a, 44a, 45a, 46a, 47a, 49a, 50a. The court did not comment on the admissions of Government witnesses that they altered key Government exhibits. Every factual allegation of the Government was placed in issue by Tull, except for his admission that the filling he conducted on his properties was done without a permit issued by the Secretary of the Army. The

trial court acknowledged that Tull denied liability on all counts. Pet. App. 31a. As previously noted, the Government presented the testimony of 16 witnesses and moved 87 exhibits into evidence, while Tull presented the testimony of 16 witnesses and moved 46 exhibits into evidence, during the fifteen-day trial. At the conclusion of the case, the District Court, sitting without a jury, made the findings of fact necessary to find in favor of the Government and against Tull.

In addition to determining liability, a jury was also required to fix the amount of damages. The Court of Appeals' assertion that *Hepner*, *supra*, and *Regan*, *supra*, are distinguishable because the civil penalties involved were of a specified amount, $1,000, while the civil penalties contained in 33 U.S.C. § 1319(d) are set at a maximum of $10,000 per day per violation, simply does not square with historical experience and precedence. Pet. App. 9a. As we have pointed out, every reported case since 1775 has held that an action to collect a civil penalty is an action in debt. While the amount of the civil penalty is sometimes fixed, as in *Hepner* and *Regan*, this is not always so. It is not unusual in civil penalty cases for the penalty to be a multiplier of the value of the goods. *Stockwell* v. *United States*, *supra*; *Chaffee* v. *United States*, *supra*. In these cases, it was necessary for the jury to fix the value of the goods before the multiplier was applied. This Court in *Hepner* cited approvingly to *United States* v. *Clafin*, 97 U.S. 546 (1878), as did this Court in *Regan*, for the proposition that "[i]t must be taken as settled law that a certain sum, *or a sum which can readily be reduced to a certainty*, prescribed in the statute as a penalty for the violation of law, may be recovered in a civil action" (emphasis added). Without the Court of Appeals' unwarranted and erroneous assumption that a civil penalty of a maximum amount with no minimum amount is a form of equitable relief, the only difference between *Hepner*, *Regan*, and the instant case is that here *the jury* may set the amout of civil penalties

if it finds a violation of the statute, and in an amount limited by 33 U.S.C. § 1319(d).

It is difficult to understand the lower court's reasoning for its position that a maximum fixed amount is somehow relevant. American juries have for over 200 years been determining questions of fact and assessing penalties and damages. In criminal cases, juries in many States not only find guilt or innocence but fix penalties. Most criminal statutes provide a broad range of discretion to the juries, but with a maximum—*e.g.*, imprisonment for a term of five to fifteen years. Criminal statutes typically provide for juries to impose fines of varying amounts, with the upper limits established by statute. Juries in civil cases not only find liability but set the amount of damages based upon the evidence presented in the case. In appropriate cases, juries also fix the amount of punitive damages. As juries customarily make determinations of the amount of imprisonment, fine, compensatory damages and punitive damages based upon the evidence in each case and from a broad range of possibilities, it is difficult to understand the lower court's rationale for differentiating the instant case from *Hepner* and *Regan*, upon the basis that the amount of the penalty was fixed in those cases.

Nothing in the foregoing in any way undermines the equity jurisdiction of the District Court. The judge in a case involving civil penalties may consider any request for equitable relief, and grant any equitable relief within his jurisdiction. As in any case involving both legal and equitable claims, the judge is of course bound by the findings of fact made by the jury with respect to issues common to the legal and equitable claims. The judge remains free, however, to find those facts that are at issue only with respect to equitable relief, and to fashion such equitable relief as may be appropriate.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 85-1259

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Seventh Amendment guarantees a right to a jury trial in an action brought by the United States under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, seeking injunctive relief, restoration of filled wetlands, and civil penalties.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the district court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610.

JURISDICTION

The decision of the court of appeals was entered on July 30, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 26a-27a), and November 4, 1985 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on January 24, 1986, and was granted on May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

33 U.S.C. 1319 provides in relevant part:

> **(b) Civil actions.** The Administrator [of the Environmental Protection Agency] is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.
>
> * * * * *
>
> **(d) Civil penalties.** Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

STATEMENT

1. a. Although the sovereign's power to prevent the obstruction of navigable waterways has long existed in English and American law (see pages 18-24, *infra*), it was not until 1890 that Congress created a statutory prohibition to facilitate the exercise of that power. Section 10 of the Rivers and Harbors Appropriations Act of 1890 (the Act), prohibited the creation of any obstruction to the navigable capacity of any waters "not affirmatively authorized by law," and authorized the imposition of criminal penalties for violations of its prohibitions. In addition, the Attorney General was authorized to institute "proper proceedings in equity" to seek removal of the obstruction (26 Stat. 454). See generally *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 709 (1899). In 1899, the entire Rivers and Harbors Appropriations Act of 1890 was reenacted with minor modifications. See *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 656-657 (1973). The authority of the Attorney General to seek removal of unlawful obstructions was retained in Section 12 of the Act, 33 U.S.C. 406.[1]

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[1] Section 12, 33 U.S.C. 406, provides in pertinent part as follows:

> [T]he removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such

As amended in 1899, Section 10 of the Act, 33 U.S.C. 403, generally forbids the placing of fill into or otherwise obstructing navigable waters "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." The Act has been held to prohibit both obstructions to navigation (see *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915)), and (in Section 13, 33 U.S.C. 407) the pollution of the Nation's waters (see *United States* v. *Pennsylvania Industrial Chemical Corp.*, *supra*), except under conditions approved by the Army Corps of Engineers.

b. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)).[2] In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into navigable waters, excepting only discharges made in compliance with other sections of the CWA. Any violation of Section 301 of the CWA may be challenged in district court by the Environmental Protection Agency (EPA) under Section 309(b), 33 U.S.C. 1319(b), which authorizes the court to award "appropriate relief, including a permanent or temporary injunction * * *." Section 309(d), 33 U.S.C. 1319(d), subjects

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structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

[2] The statute originally was named the Federal Water Pollution Control Act. Congress changed the name of the statute in 1977. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this brief.

a violator to civil penalties of up to $10,000 per day for each violation.[3]

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program to regulate the discharge of dredged or fill material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)). Pursuant to regulations published in 1977,[4] the Corps' jurisdiction under Section 404 extends to certain "wetlands," which are defined to include: "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. 323.2(c).

Prior to issuance of a Section 404 permit, the Corps determines not only the extent of the wetlands on the property to be filled, but also the environmental effect of the proposed filling on those wetlands. These determinations are made by applying guidelines de-

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[3] Section 309(c) of the CWA, 33 U.S.C. 1319(c), authorizes the imposition of criminal penalties for willful or negligent violations of the CWA.

[4] The Corps' current definition of "waters of the United States," including "wetlands," is a reworded but substantively unchanged version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 2. Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs.

veloped by the Administrator of the EPA in conjunction with the Secretary of the Army. Section 404(b), 33 U.S.C. 1344(b). See generally 40 C.F.R. Pt. 230. The resulting permit decision is thus supported by an administrative record (see generally 33 C.F.R. 325.2(a)(6)), and is subject to review in a district court pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 905 (5th Cir. 1983) (collecting cases).

2. Petitioner is engaged in the business of filling and developing residential resort properties on the island of Chincoteague, Virginia (Pet. App. 2a).[5] Four of these properties are the subject of this litigation—the Ocean Breezes subdivision (consisting of the Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Sections B and C), the Mire Pond Camper sites (Mire Pond I and II), Eel Creek, and Fowling Gut Extended.

Beginning in 1975, petitioner developed the Ocean Breezes subdivision as a mobile home site (Pet. App.

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[5] Petitioner repeatedly has been sued for violating the Clean Water and Rivers and Harbors Acts in his commercial activity on Chincoteague Island. In 1975, the United States unsuccessfully sought to prevent petitioner from filling areas behind a bulkhead in a development known as the Inlet View Campground (C.A. App. 1374-1380). In 1985, the United States successfully prosecuted petitioner for the construction of a 296-foot oyster shell road in a wetlands area. *United States* v. *Tull*, Civ. No. 84-186-N (E.D. Va. June 26, 1985), appeal pending, Nos. 85-2041(L) and 85-2249 (4th Cir.). In 1986, petitioner was successfully prosecuted for filling wetlands in an area known as Ocean Breeze Section D, and for blocking tidal channels in an effort to dry out wetlands in the same area. *United States* v. *Tull*, Civ. No. 85-649-N (E.D. Va. May 15, 1986), appeal pending, No. 86-3067 (4th Cir.).

4a). Development of the area required the placing of approximately 20,000 cubic yards of fill, mostly sand, at the site (*id.* at 39a). Petitioner developed the Mire Pond Camper Sites beginning in 1978 (*id.* at 4a, 39a). That development required the placing of fill to a depth of approximately three feet (*ibid.*). Fowling Gut Extended, a 40-foot-wide canal (*id.* at 48a), was filled by petitioner beginning in 1976 (*id.* at 4a, 50a). Fill was placed on the Eel Creek site in 1980 (*id.* at 4a). Petitioner did not apply for either a Section 10 or Section 404 permit from the Corps for any of this filling (Pet. App. 4a).

On July 1, 1981, the United States filed a complaint against petitioner, charging him with violations of the Clean Water Act. As amended on October 5, 1982 (Pet. App. 67a-73a), to include a charge that he violated the Rivers and Harbors Act, the complaint alleged that petitioner had discharged pollutants into waters of the United States, without a permit from the Corps of Engineers, in violation of 33 U.S.C. 403, 1311(a) and 1344 (Pet. App. 69a-70a). The complaint alleged that the fill had been discharged into wetlands at the Ocean Breezes subdivision (*id.* at 68a), the Mire Pond Camper Sites (*id.* at 69a), the Eel Creek site (*id.* at 70a), and into additional wetlands owned or controlled by petitioner (*id.* at 71a). The United States sought an order enjoining petitioner from committing further violations, directing removal of fill and restoration of affected areas, assessing civil penalties in accordance with Section 309(d) of the CWA, and granting "such other relief as the Court may deem just and proper" (Pet. App. 72a). In an order issued on September 9, 1981 (J.A. 80-81), the court denied petitioner's request for a jury trial, finding the relief requested by

the United States to be "in every instance, equitable in nature * * *" (*id.* at 81).

A 15-day bench trial was held between July 27 and November 24, 1982.[6] Contrary to his current assertion (Br. 3), petitioner did not contest the allegation that he placed sand and other fill material onto the properties that were the subject of the complaint (Pet. App. 38a-39a), nor did he claim that he ever had applied for a permit from the Corps prior to the filling (*id.* at 54a). The trial thus was primarily concerned with petitioner's argument that the properties he filled were not wetlands subject to the jurisdiction of the Corps.[7] The district court heard the evidence of 26 witnesses, including 12 expert witnesses called by the United States and one expert called by the district judge himself.

In its opinion, the district court found "substantial, credible evidence" (Pet. App. 40a) that petitioner had filled wetlands at the Ocean Breezes, Mire Pond and Eel Creek sites (*id.* at 40a-46a). The court also found that Fowling Gut Extended "was navigable in fact and was utilized by boat traffic

[6] The district court rejected petitioner's arguments that the Clean Water Act and the regulations promulgated pursuant to that Act either effected a taking of his property or were unconstitutionally vague (Pet. App. 54a-55a). The court also rejected petitioner's claim that the government should be equitably estopped from enforcing the law against him (*id.* at 56a-57a). The court of appeals affirmed these holdings (*id.* at 6a-8a, 10a-12a), and these issues are not before this Court for review.

[7] As a question of regulatory and statutory interpretation (see *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 2), the issue whether the Corps had jurisdiction over petitioner's property as "adjacent wetlands" was decided by the court.

subsequent to 1963 and prior to the time when [petitioner] filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineer[s]" (*id.* at 49a). Once having filled the canal, the court found, petitioner sold lots at the site "that were actually a filled navigable waterway" and "profited by his sale of [those] lots * * *" (*id.* at 50a). The court concluded that petitioner had shown "scant respect for the preservation of waters of the United States" (*id.* at 60a).

To remedy these violations, the district court assessed a civil penalty of $35,000 for the filling at Ocean Breezes (Pet. App. 60a), $35,000 for the filling at Mire Pond (*ibid.*), and $5,000 for the filling at Eel Creek (*ibid.*). Petitioner also was ordered to remove the fill that he had placed on five lots at Ocean Breeze Section C (*id.* at 61a), to convert two upland lots at Mire Pond II to wetlands (*ibid.*),[8] to restore all filled areas of Eel Creek to wetlands (*id.* at 62a), and to refrain from further filling activities without applying for a Corps of Engineers permit (*ibid.*). The court established the penalty for the filling of Fowling Gut Extended in the alternative: it directed petitioner either to pay a civil penalty of $250,000 or to "restore the extension of Fowling Gut to its former navigable condition * * *" (*id.* at 61a).

3. In affirming, the court of appeals rejected petitioner's claim that he erroneously had been denied his constitutional right to a trial by jury. Determining that the penalties the government sought "are within the district court's discretion" (Pet. App. 9a),

[8] These lots were to be converted to wetlands as compensation for the wetlands lots in Mire Pond I that are now filled and occupied by third parties.

the court explained that "the government is not suing to collect a penalty analogous to a remedy at law, but is asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine" (*ibid.*). Distinguishing the assessment of penalties from punitive damages actions at law, the court held that (*id.* at 9a-10a (footnote omitted))

> the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence. In such circumstances, the seventh amendment is inapplicable.

SUMMARY OF ARGUMENT

This Court's test for the availability of a jury under the Seventh Amendment is well-settled: a party may demand a jury if the "rights and remedies" at issue in the suit are of the sort that were tried to a jury in common law courts in 1791. *Pernell* v. *Southall Realty*, 416 U.S. 363, 381 (1974). Under this analysis, a jury trial is constitutionally guaranteed only if both the remedy *and* the cause of action were treated as "legal" in nature by the English courts in 1791. If either the right or the remedy had been viewed as equitable, Chancery would have taken jurisdiction and a jury trial would have been unavailable. In this case, petitioner cannot prevail because both the cause of action pursued by the United States and the remedy awarded by the court are equitable in nature.

A. By far the closest historical analogue to the cause of action created by the Clean Water Act was

one to cure a "public" or "common" nuisance. In 1791, it was recognized that the sovereign could bring such an action to enjoin the obstruction of public waters or to abate offensive trades that polluted the environment. Both of these types of nuisance actions fell squarely within the jurisdiction of the courts of equity. See *Mugler* v. *Kansas*, 123 U.S. 623, 672-673 (1887); *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring). Because public nuisances were inherently of a continuing or recurring nature and affected large numbers of people, refusing equity jurisdiction in such cases would have made it necessary for many private plaintiffs to bring repeated suits for damages. And even a host of damage actions could not have fully protected the continuing interest of the public in, for example, the maintenance of a harbor unobstructed by illegal filling. In these circumstances, courts of law were seen as wholly inadequate to vindicate the public rights implicated in common nuisance actions.

Given the English precedents on this point, it is not surprising that recognition of the power of equity courts to enjoin public nuisances has been a "commonplace of jurisdiction in American judicial history." *Steelworkers*, 361 U.S. at 61 (Frankfurter, J., concurring). And this Court has expressly held that the Seventh Amendment has no application in such suits. *Mugler*, 123 U.S. at 673. Under the first prong of the Seventh Amendment test, then, petitioner cannot prevail.

B. While the equitable character of the Clean Water Act cause of action is enough to dispose of petitioner's claim, that claim also is foreclosed by the second prong of the Court's historical test: the *rem-*

edy available under the Act is equitable in nature. The injunctive relief sought by the government plainly was equitable. And the civil penalties made available under the Clean Water Act—which are awarded at the district court's discretion, and which in large part are designed to force a violator to disgorge improper profits—are of a sort traditionally viewed as equitable.

1. The civil penalties authorized by the Clean Water Act are not a fixed sum. To the contrary, those penalties are set at the discretion of the court, after the weighing of an array of equitable factors. In making penalties available, Congress endorsed the Environmental Protection Agency's penalty calculation policy. This policy looks first to the economic benefit that the violator obtained from violating the law. From there, the final penalty is determined by using a range of discretionary considerations to modify that amount: the environmental impact of the violation; the effect of the violation on the regulatory system; the state of mind of the violator; the violator's history of compliance with the Clean Water Act; and the violator's ability to pay. The discretion that infuses the court's assessment of penalties also is made manifest by the role of civil penalties as part of a package of equitable relief that may be awarded under the Act in a manner that provides the most efficacious and equitable remedy. This sort of discretionary calculation, turning on a balancing of statutory, policy, technical and particularized equitable factors, historically would have been performed by a court sitting in equity.

2. The *nature* of the factors taken into account by the court in setting a Clean Water Act civil penalty also demonstrates the equitable character of the pen-

alty remedy. Under the EPA penalty policy endorsed by Congress in 1977, the most important single criterion in setting a penalty is the economic benefit obtained by the polluter by virtue of his noncompliance with the statute. In their calculation and effect, civil penalties therefore are closely analogous to the classic equitable remedy of disgorgement. As such, they are integral parts of an equitable remedy that "differs greatly from * * * damages." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946).

3. Petitioner disregards these considerations in arguing that all actions to collect statutorily-created penalties are legal in nature. This contention fails to take account of the different types of money judgments rendered by the courts. An action to collect a statutory penalty may be analogous to a legal action for debt when—as in, for example, a contract action—the suit is for " 'a sum certain * * * due to the plaintiff, or a sum which can readily be reduced to a certainty.' " *United States* v. *Regan*, 232 U.S. 37, 41 (1914) (citation omitted). Virtually all of the cases cited by petitioner involved attempts to collect fixed penalties of that sort. But however analogous such penalties may be to debts at law, they differ fundamentally from penalties assessed under the Clean Water Act. Because the amount of a Clean Water Act penalty turns on an exercise of the judge's discretion—and involves an assessment of the seriousness of the offense, the efficacy of other forms of relief, and the like—it plainly is neither a "sum certain" nor "a sum which can readily be reduced to a certainty." Indeed, to the extent that Clean Water Act civil money penalties have an objectively-calculable component, it is measured by the violator's profit, an amount equivalent to "equitable" disgorgement rather than to "legal" debt.

C. Finally, even if the civil penalties at issue here somehow were deemed to be legal in nature, petitioner still would not be entitled to a jury trial. It has long been settled that where "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to * * * award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399. In both the public nuisance and other contexts, the Court accordingly has indicated that an equity court may award any remedy necessary to provide complete relief. Here, of course, the government properly invoked the equitable jurisdiction of the district court for injunctive purposes. In these circumstances, the court was empowered to award monetary penalties as an adjunct to equitable relief to provide a complete remedy.

It is true, as this Court explained in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), that when independent legal and equitable claims are joined in a single suit, the legal claim must ordinarily be tried first to preserve the right to trial by jury on that claim; if the equitable claim is first resolved by a judge, a subsequent trial of related issues before a jury would be barred by collateral estoppel. But this doctrine has no application in a case—such as this one—that involves only a *single* cause of action seeking both equitable and (arguably) legal relief. Indeed, since rendering the decision in *Beacon Theatres*, the Court has expressly reaffirmed the proposition that a court sitting in equity may award legal relief when necessary to provide a complete remedy. *Katchen* v. *Landy*, 382 U.S. 323, 339-340 (1966). In any event, even if the *Beacon Theatres* doctrine otherwise had relevance here, the Court, as

a prudential matter, properly should decline to apply it to avoid "dismember[ing] a scheme which Congress has prescribed." *Katchen*, 382 U.S. at 339.

ARGUMENT

THE SEVENTH AMENDMENT DOES NOT CONFER A RIGHT TO A JURY TRIAL IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." As this Court repeatedly has explained, "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity * * * in which jury trial was not." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449 (1977). "The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935). See generally *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 333 (1979); *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974); *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970); *Simler* v. *Conner*, 372 U.S. 221, 223 (1963); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470-471 (1962); *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 445-448 (1830).

Under the Court's historical approach, a party is entitled to trial by jury only if he establishes that the "rights and remedies" at issue are of the sort that traditionally were tried to a jury in courts of law. *Pernell* v. *Southall Realty*, 416 U.S. at 381.

This inquiry focuses on the practice in 1791, at the time of the adoption of the Amendment. See *Parklane Hosiery Co.*, 439 U.S. at 333; *Dimick* v. *Schiedt*, 293 U.S. 474, 496 (1935); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 642 & n.8 (1973). And, as Justice Story explained in one of the earliest interpretations of the Amendment, the jury trial inquiry is concerned principally with "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812) (No. 16,750). See *Pernell*, 416 U.S. at 371-374, 376-379; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8 (1899); Wolfram, *supra*, 57 Minn. L. Rev. at 641.

When, as in this case, the rights and remedies involved are created by a statute enacted after the adoption of the Seventh Amendment, jury trial is available if the statutory action "serves the same essential function" as an action triable to a jury at common law. *Pernell*, 416 U.S. at 375. Determining whether the statutory action does so requires "fitting the [modern] cause into its nearest historical analogy." *Ross*, 396 U.S. at 543 n.1 (Stewart, J., dissenting). Cf. *Curtis*, 415 U.S. at 194.[9]

While petitioner focuses his historical inquiry almost entirely on the remedy sought by the govern-

[9] Amicus Washington Legal Foundation ignores this historical test when it argues (Br. 9) that, even where it could constitutionally be withheld, the jury trial right "cannot be denied unless expressly negated [by Congress]." Indeed, amicus's view would sweepingly expand the reach of the Seventh Amendment in the precise context—congressionally created public rights—where this Court has held that a jury trial is not required. See *Atlas Roofing Co.*, 430 U.S. at 455.

ment in this case (see Pet. Br. 18-25), under this Court's analysis a jury trial is constitutionally guaranteed only if both the remedy *and* the cause of action were treated as legal by the English courts in 1791. If either the right *or* the remedy had been viewed as equitable in nature in 1791, Chancery would have taken jurisdiction and a jury trial would have been unavailable. Because the remedial powers of law courts were strictly limited, parties were forced to seek the assistance of courts of equity—and thus to forgo a jury trial—when they attempted to vindicate legal rights with equitable remedies.[10] See 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 127, at 169; § 139, at 191-192 (5th ed. 1941); G. Keeton, *An Introduction to Equity* 237 (6th ed. 1965); Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 Mich. L. Rev. 1571, 1572-1573 (1983) (citing J. Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* (Dublin 2d ed. 1789) (London 1st ed. 1780)); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 Harv. L. Rev. 737, 741, 753-754 n.127 (1983). Similarly, the rigidity of the common law courts made

[10] This is illustrated in a modern context by the unavailability of a jury trial in employment discrimination actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* While the substantive right to be free from discrimination gives rise to an action at law (see *Curtis*, 415 U.S. at 195-196 n.10), the backpay remedy provided by Title VII is equitable. See *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1141 (citing cases), modified on other grounds, 657 F.2d 962 (8th Cir.), cert. denied, 454 U.S. 1064 (1981). The equitable nature of the remedy makes the Seventh Amendment guarantee inapplicable. See generally *Curtis*, 415 U.S. at 197; Note, *supra*, 96 Harv. L. Rev. at 747-748 & n.80.

it impossible for them to entertain equitable causes of action, even when the litigant sought a legal remedy. See generally 1 J. Pomeroy, *supra*, § 108, at 139; 4 *id.* § 1420, at 1076; Note, *supra*, 96 Harv. L. Rev. at 748.[11] In this case, petitioner cannot prevail because both the cause of action pursued by the United States and the remedy awarded by the court are equitable.[12]

A. The Cause Of Action Created By The Clean Water Act Is Equitable In Nature

1. At the outset, the right to a jury trial is inapplicable here because the cause of action created by the Clean Water Act is essentially equitable in nature. While the permit and regulatory apparatus created by the CWA was of course unknown at com-

[11] The Court has declined to decide whether the Seventh Amendment has any "application to Government litigation and leaves solely to the Sixth Amendment the function of interposing a jury between the Federal Government and an individual from whom it wishes to exact a fine." *Atlas Roofing Co.*, 430 U.S. at 450 n.6. Because, as we explain below, the Seventh Amendment is inapplicable here under the traditional historical test, this case likewise does not require the Court to resolve that question.

[12] Correspondingly, petitioner would not have been entitled to a jury trial had he sought and been denied a permit to conduct filling activities. In those circumstances, his claim initially would have been assessed by the Corps, with judicial review in the district court based on the administrative record (see page 6, *supra*). Where a determination of public rights—such as those involved under the Clean Water Act and Rivers and Harbors Act (cf. *California* v. *Sierra Club*, 451 U.S. 287, 295 (1981); *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 19)—is committed to an administrative agency, the Seventh Amendment's guarantees are inapplicable. See *Atlas Roofing Co.*, 430 U.S. at 455, 458-459.

mon law, by far the closest historical analogue to an action under the CWA was one to cure a "public" or "common" nuisance. "Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires." 4 W. Blackstone, *Commentaries on the Laws of England* 167 (T. Green ed. 1979) (1st ed. 1769). See 1 W. Hawkins, *A Treatise on the Pleas of the Crown* 197 (1724). As an annoyance to the "whole community in general," common nuisances were a cause of action available only to the Attorney General or the Crown, and could not be brought by private plaintiffs. 4 W. Blackstone, *supra*, at 167.

Two species of common nuisance actions that were well-developed in 1791 are directly analogous to suits brought under present-day environmental regulations. The sovereign could bring a claim for a so-called "purpresture" to enjoin, fine, or order the repair of an enclosure or obstruction of public waters or rivers; alternatively, the sovereign could enjoin or fine "offensive trades and manufactures" that polluted the environment. 4 W. Blackstone, *supra*, at 167.[13] Compare *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 314 n.7 (1982) ("The objective of this [Clean Water Act] statute is in some respects similar to that

[13] Indeed, the particular form of nuisance most directly analogous to the filling of wetlands alleged in the instant case —the diverting of public watercourses or raising or lowering of a pond—was one of the earliest forms of nuisance recognized in medieval law. See McRae, *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 37 & nn.62, 64 (1948) (citing cases).

sought in nuisance suits"). Cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (the federal common law of nuisance in the water pollution area is preempted by the CWA).

2. Both species of common nuisances fell clearly within the jurisdiction of the courts of equity. Almost 100 years ago, this Court endorsed Justice Story's observation that " '[in] regard to public nuisances,' * * * 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property.' " *Mugler* v. *Kansas*, 123 U.S. 623, 672-673 (1887) (citations omitted). Accord, *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring) (citing *Bond's Case*, Moore 238 (1587); *Jacob Hall's Case*, 1 Ventris 169, 1 Mod. 76 (1671); *The King* v. *Betterton*, 5 Mod. 142 (1696); *Baines* v. *Baker*, 3 Atk. 750, 1 Amb. 158 (1752); and *Mayor of London* v. *Bolt*, 5 Ves. 129 (1799)). "This old, settled law was summarized in 1836 by the Lord Chancellor in the statement that * * * 'a court of equity has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbours and public roads; and, in short, generally, to prevent public nuisances.' *Attorney-General* v. *Forbes*, 2 M. & C. 123, 133." *Steelworkers*, 361 U.S. at 60 (Frankfurter, J., concurring). See *Mugler*, 123 U.S. at 673.[14]

[14] See, *e.g.*, *Bond's Case*, *supra* (enjoining operation of a pigeonhouse causing a public nuisance); *Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames Eq. Jur. 615 (1795) (enjoining the filling of shoreline and erection of key and docks, and ordering restoration of harbor to prior status); *Attorney General* v. *Hunter*, 1 Dev. Eq. (N.C.) 12, 1 Ames Eq. Jur. 621 (1826) (damming of mill-pond caused "exhalations" that were unhealthy); J. Pomeroy, *A Treatise on Equity Jurisprudence* 830 (1907) (citing cases); W. Walsh, *A Treatise on Equity* 198 (1930) ("There is no question about the ending of purprestures by negative or mandatory injunction as the case may require"). See also *Robinson* v. *Byron (Lord)*, 1 Bro. C.C. 588, 1 Ames Eq. Jur. 566 (1785) (equity court ordered injunction against obstruction of public waters); *Bush* v. *Western*, Prec. Ch. 530, 1 Ames Eq. Jur. 553 (1720) (equity court granted injunction in private suit arising out of obstruction of watercourse).

The foundation of equity jurisdiction in this category of cases was the probability that public nuisances would cause irreparable injury that could not be remedied adequately with pecuniary compensation, and that they would lead to a multiplicity of suits at law by injured parties. See 1 H. Ballow, *A Treatise of Equity* 3 n.* (1835). Because public nuisances were inherently of a continuing or recurring nature and affected large numbers of people, refusing equity jurisdiction would have made it necessary for many private plaintiffs to bring repeated suits for damages, the only course of action available in a court of law. Furthermore, even a host of individual damage actions could not have fully vindicated the continuing, unquantifiable interest of the public at large in, for example, the maintenance of a harbor unobstructed by illegal filling. In those circumstances, courts of law were seen as wholly inadequate to vindicate the public rights implicated in common nuisance actions, in accord with the principle that equity would intervene to protect from common nuisances. W. Walsh,

A Treatise on Equity 199-200 (1930). See *Mugler*, 123 U.S. at 672-673.

3. As the preceding discussion makes clear, public nuisance actions were understood to be equitable in nature at the time of the adoption of the Seventh Amendment. Indeed, in 1795—almost contemporaneously with the ratification of the Amendment in the United States—the English Attorney General, on behalf of the Crown, brought a nuisance suit in Chancery on facts remarkably similar to those giving rise to this action. *Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames Eq. Jur. 615 (1795). The Attorney General alleged that the defendants had filled shoreline and built docks and buildings between the high and low water marks in a harbor, thus threatening "damage to the harbour, by preventing the free current of the water to carry off the mud" (1 Ames Eq. Jur. at 615). The Attorney General sought to enjoin further filling or building, and the restoration of the harbor "to its ancient situation" (*ibid.*).

The Chancellor unequivocally held that "where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." 1 Ames Eq. Jur. at 617. Although there were disputed factual issues—the defendant claimed to hold the filled waterfront under letters-patent that permitted his activities (see *id.* at 615)—the Chancellor in *Richards* expressly affirmed his authority to decide the case without a jury (*id.* at 617). Indeed, the English equity courts continued during the ensuing decades to enjoin purprestures in public waterways. See, *e.g.*, *Attorney General* v. *Parmeter*, 10 Price 378 (1811), aff'd by the House of Lords, 10 Price 412 (1812) (enjoining obstruction of Portsmouth Harbor); *Attorney General* v. *Johnson*, 2 Wils. Ch. 87 (1819) (enjoining obstruction of the Thames River).[15]

Given the English precedents, it is not surprising that recognition of the power of equity courts to enjoin or fine public nuisances has been a "commonplace of jurisdiction in American judicial history." *Steelworkers*, 361 U.S. at 61 (Frankfurter, J., concurring).[16] Indeed, Congress specifically provided that suits to enforce the original predecessor to the CWA, the Rivers and Harbors Appropriations Act of 1890—the first federal statute aimed at preventing the

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[15] Although the Chancellor in equity could at his discretion "issue" or impanel advisory juries or commissions of lawyers "to inform the conscience of the court," *Parsons* v. *Bedford*, 28 U.S. at 446 (see, *e.g.*, *Bullen* v. *Michel*, 2 Price 399, 488-489 (1816); *O'Connor* v. *Cook*, 6 Ves. Jun. 665, 667, 671 (1802), aff'd on this ground, 8 Ves. Jun. 536 (1803); *Attorney General* v. *Philpott*, 8 Ch. 1 (cited in *Attorney General* v. *Richards*, 1 Ames. Eq. Jur. at 616 ("commission" appointed to determine existence of a purpresture)), this was not the equivalent of a common law jury whose fact finding could be set aside only as against the law or the evidence. See *Capital Traction Co.* v. *Hof*, 174 U.S. at 39; A. Sutherland, *Notes on the Constitution* 669-670 (1904); *Attorney General* v. *Hunter*, 1 Ames. Eq. Jur. 621 (1826); *Bullen* v. *Michel*, 2 Price at 319; *Adley* v. *The Whitstable Co.*, 17 Ves. Jun. Supp. 478 (1815) (reserving to equity court the ultimate determination of matters sent to advisory jury).

[16] See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, 237 U.S. 474 (1915) (air pollution from copper smelter); *Arizona Copper Co.* v. *Gillespie*, 230 U.S. 46 (1913) (steam pollution); *In re Debs*, 158 U.S. 564 (1895); *Mugler* v. *Kansas*, *supra*; *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Georgetown* v. *Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98 (1838); *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244 (1870); *Board of Health* v. *Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *Village of Pine City* v. *Munch*, 42 Minn. 342, 344, 44 N.W. 197-198 (1890).

filling or obstruction of the Nation's waterways—should be brought in courts of equity (26 Stat. 454). And this Court has expressly held that the Seventh Amendment has no application in public nuisance suits. In *Mugler* v. *Kansas*, *supra*, an action involving a statute prohibiting the manufacture and sale of intoxicating liquors without a permit, the Court noted the "salutary jurisdiction" of an equity court to hear public nuisance cases (123 U.S. at 673). In response to the claim that a trial by jury nevertheless was necessary, the Court held that "it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance" (*ibid.*).

In sum, the closest historical analogue to the cause of action here, common nuisance in general and purpresture in particular, was incontrovertibly available in equity.[17] Under the first prong of the Seventh Amendment test, petitioner accordingly cannot claim a right to a jury trial.

B. The Remedy Created By The Clean Water Act Is Equitable

While the equitable nature of the Clean Water Act cause of action is enough to dispose of petitioner's claim, that claim also is foreclosed by the second prong of the Seventh Amendment's historical test:

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[17] While these public nuisance cases brought in equity generally sought injunctive relief without civil penalties, the cases establish that the cause of action of public nuisance was available in equity courts, thus satisfying the first prong of the historical test. In contrast to this large body of English and American law, we have found no instances in the years preceding or contemporaneous with the passage of the Seventh Amendment in which a law court entertained a public nuisance cause of action brought by the sovereign.

the *remedy* available under the Act is equitable in nature. Petitioner evidently acknowledges (Pet. Br. 27) that the injunctive relief sought by the government was equitable, but insists that the civil penalty awarded by the court amounted to legal relief. In fact, however, the civil penalty at issue here, which was awarded at the district court's discretion and which was designed in large part to force petitioner to disgorge his improper profits, is of the sort traditionally viewed as equitable. Congress authorized the award of such penalties, moreover, as part of a package of remedies designed to afford complete relief against violators of the CWA—that is, as part of the sort of comprehensive package of remedies traditionally awarded by courts of equity.

1. The civil penalties made available under the Clean Water Act are not a fixed sum certain equivalent to the amount sought in a common law action for debt. To the contrary, those penalties are set at the discretion of the court, after the weighing of an array of equitable factors.[18]

The discretionary nature of the civil penalty remedy is first made clear by the factors that shape a CWA case even before it reaches district court. The legislative history of the 1972 and 1977 Clean Water Act amendments shows that Congress intended to give the United States broad discretion regarding when to bring an action and how to frame the request for relief. See 1 CRS, Library of Congress, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at

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[18] Amicus U.S. Chamber of Commerce's attempt to characterize Clean Water Act civil penalties as punitive damages (see Br. 8) cannot be reconciled with this Court's holding that punitive damages are not available under the Act. Cf. *Middlesex County Sewerage Authority*, 453 U.S. at 16-17.

174 (Comm. Print 1973) [hereinafter cited as *Leg. Hist.*]; 1 *Leg. Hist.* 315; see also 2 *Leg. Hist.* 1482; *id.* at 1235 (comments of Rep. Terry). In 1972, Congress made it clear that civil penalties and injunctive relief could be sought concurrently and interchangeably in any case, at the government's discretion. 1 *Leg. Hist.* 802. In doing so, it adopted the Administration's suggestion that "Section 309(b), (c) and (d) should be made to conform to each other as much as possible to avoid any unintended distinctions being drawn between violations subject to injunctive relief, criminal and civil penalties." 1 *Leg. Hist.* 848.

This flexibility of remedies was continued in the 1977 amendments to Section 309, which extended the provision's coverage over industrial discharges of pollutants. As Congress emphasized, "[t]hese remedies are all at the discretion of the Administrator. No discharger has any right to compel the Administrator to provide a particular remedy. These remedies are in addition to and not exclusive of existing remedies." 3 CRS, Library of Congress, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* 464 (Comm. Print 1978).

Once a violation is adjudicated, Congress envisioned that the courts also would perform highly discretionary calculations in awarding civil penalties.[19] When it enacted the 1977 amendments, Congress ex-

[19] In this respect, the Clean Water Act is similar to other environmental protection statutes, which leave the amount of civil penalties to the judge's discretion. See, *e.g.*, Clean Air Act, 42 U.S.C. 7413(b); Resource Conservation and Recovery Act, 42 U.S.C. 6928(g); Safe Drinking Water Act, 42 U.S.C. 300g-3(c).

pressly endorsed EPA's then-existing penalty calculation policy (see 123 Cong. Rec. 39190 (1977) (remarks of Sen. Muskie)),[20] which remains substantially the same today.[21] In setting a penalty, this policy—which was developed to guide EPA negotiators in reaching settlements with violators of the CWA—looked first to the economic benefit that the violator obtained from failing to comply with the CWA. From there, the final penalty would be determined by using a range of discretionary considerations to modify the amount of the improper benefit: the environmental impact of the violation; the effect of the violation on the regulatory system; the state of mind of the violator; the violator's history of compliance with the CWA; and the violator's ability to pay. See Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977); Memorandum from Stanley W. Legro to EPA Regional Administrators (June 3, 1977), *reprinted in* 123

[20] Congress had a detailed knowledge of EPA's existing penalty policy (see Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977)); even in the absence of an express statement to that effect, Congress accordingly should be presumed to have endorsed the Agency's approach. See generally *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

[21] Courts interpreting the Clean Water Act have looked to the EPA Penalty Policy in setting the amount of civil penalties. See, *e.g.*, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556-1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985). See also *United States* v. *Akers*, 785 F.2d 814, 823 (9th Cir. 1986), cert. denied, No. 85-2130 (Oct. 6, 1986).

Cong. Rec. 39191 (1977). See generally *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985).

As the court of appeals explained, the discretion that infuses a court's choice of a given money penalty also is made manifest by the role of civil penalties as part of a package of equitable relief that may be awarded under the Clean Water Act. The "objective of the [CWA] is to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Romero-Barcelo*, 456 U.S. at 314 (quoting 33 U.S.C. 1251(a)). This purpose, the Court has noted, "is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies" (456 U.S. at 314 n.7). Not surprisingly, then, the CWA "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act" (*id.* at 320). A court adjudicating a CWA case therefore is free to make use of whatever combination of injunctive relief and civil penalties will most efficaciously and equitably remedy a violation (see *id.* at 314)—"to mould each decree to the necessities of the particular case" (*id.* at 312). See generally W. Rodgers, *Environmental Law* § 4.6, at 404 (1977). That process is well-illustrated here, where the court awarded the larger part of the civil money penalties to induce petitioner to restore the Fowling Gut Extended waterway to its former condition.[22]

[22] Petitioner challenged this penalty before the lower courts (see C.A. Br. 21-22) by asserting that the portion of the government's complaint directed at the filling of Fowling Gut Extended alleged a violation only of the Rivers and Harbors Act, which contains no provision for the assessment of civil penalties. This argument was rejected by both courts below (see Pet. App. 10a n.4; *id.* at 31a (noting that relief for the filling of Fowling Gut was requested under *both* the Rivers and Harbors Act and 33 U.S.C. 1319)), and was not renewed in the petition for certiorari.

This sort of discretionary calculation, turning on a balancing of statutory, policy, technical, and particularized equitable factors, historically would have been performed by a court sitting in equity. Thus, where the court retains "substantial discretion" about the amount of money to award,[23] "the nature of the jurisdiction which the court exercises is equitable, and under [this Court's] cases neither party may demand a jury trial." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring). See *Curtis*, 415 U.S. at 197; *Troy* v. *City of Hampton*, 756 F.2d 1000, 1003 (4th Cir. 1985), cert. denied, No. 84-1898 (Oct. 7, 1985); D. Dobbs, *Handbook on the Law of Remedies* § 2.1, at 28 (1973); H. McClintock, *Handbook of the Principles of Equity* 96 (1948); Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524, 533 (1982); Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 Envtl. L. 477, 480 (1979). See also 1 J. Pomeroy, *supra*, § 60, at 77.[24]

[23] Because Section 309(d) provides that a person who violates the CWA "shall be subject to a civil penalty," some penalty, even if only a nominal one, ordinarily is assessed in every case. See *Stoddard* v. *Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208-1209 (4th Cir. 1986).

[24] Accordingly, under other statutes establishing discretionary penalty schemes, the determination of the amount

2. The *nature* of the factors taken into account by the court in setting CWA civil penalties also demonstrates the equitable character of the penalty remedy. As we explain above, under the EPA penalty

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of civil penalties has been committed to the informed discretion of the district judge. See, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975) (Federal Trade Commission Act); *United States* v. *Duffy*, 550 F.2d 533, 534 (9th Cir. 1977) (Federal Aviation Act); *United States* v. *Ancorp National Services, Inc.*, 516 F.2d 198, 202 (2d Cir. 1975) (Federal Trade Commission Act); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 438 n.28 (2d Cir. 1974) (same); *United States* v. *Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984) (same); *Aircrane, Inc.* v. *Butterfield*, 369 F. Supp. 598, 613 (E.D. Pa. 1974) (Federal Aviation Act). Indeed, even where statutes expressly provide for a trial by jury, determination of civil penalties is left to the trial judge. See *FAA* v. *Landy*, 705 F.2d 624, 635 (2d Cir. 1983); *Duffy*, 550 F.2d at 534. See also *J.B. Williams*, 498 F.2d at 438 n.28. Thus, even if petitioner were entitled to a jury trial on the question of liability here, it would remain the province of the district court judge to assess appropriate relief. Petitioner cites no authority for his contrary assertion (Br. 34-35) that the jury should determine the amount of the civil penalty in a CWA proceeding. In fact, in the context of environmental enforcement actions, district judges universally have performed the calculation of civil penalties, often with reference to the recommendation of the EPA Administrator. See, *e.g.*, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556-1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986) (Clean Water Act), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985) (Clean Water Act). See also *State ex rel. Brown* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 438 N.E.2d 120, 124 (1982). Of course, appellate review is available to assure that a court's exercise of discretion comports with governing legal standards. *Albemarle Paper Co.*, 422 U.S. at 416.

policy endorsed by Congress in 1977, the "starting point"—as well as "the most important single criterion"—in setting a penalty is the economic benefit achieved by the polluter because of his noncompliance with the statute. Memorandum from Stanley W. Legro to EPA Regional Administrators (June 3, 1977), *reprinted in* 123 Cong. Rec. 39191 (1977). Under this policy, penalties obtain their deterrent effect by "at least remov[ing] any economic gain achieved by non-compliance." Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977). Thus Senator Muskie, Conference Committee chairman and chief co-sponsor of the 1977 Clean Water Act amendments, emphasized that "the [EPA's] current enforcement policy is to seek court imposed penalties for noncompliance with Clean Water Act requirements in amounts commensurate with the economic benefit of delayed compliance, among other factors. This policy embodies congressional intent on the criteria that should be considered by courts in imposing civil penalties under existing provisions of the act." 123 Cong. Rec. 39190 (1977) (remarks of Sen. Muskie).

In their calculation and effect, Clean Water Act civil money penalties therefore are closely analogous to the classic equitable remedy of disgorgement.[25] There is a "seeming unanimity of judicial thinking"

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[25] Petitioner conceded at trial (Tr. 2104) that he profited from the sale of the lots created by his fill activity. He testified that, if allowed to continue to fill his lots at Mire Pond, his profit from the sale of each lot there would be $2,130 (*id.* at 3336). A lot at his Eel Creek property would bring him a profit of approximately $13,000 (*id.* at 3341).

that such non-damages remedies are equitable in nature. *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1141 (8th Cir.), modified on other grounds, 657 F.2d 962, cert. denied, 454 U.S. 1064 (1981). And the Court repeatedly has made clear that restitution and disgorgement are "integral part[s] of an equitable remedy" (*Curtis*, 415 U.S. at 197) that "differs greatly from * * * damages and penalties." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946). See *Albemarle Paper Co.*, 422 U.S. at 416-418; *Pierce* v. *Vision Investments, Inc.*, 779 F.2d 302, 308-309 (5th Cir. 1986) (disgorgement and restitution in vindication of a public right is "clearly equitable" in nature); *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978) (in SEC disgorgement action court "exercis[es] the chancellor's discretion to prevent unjust enrichment"); *Arber* v. *Essex Wire Corp.*, 490 F.2d 414, 420 (6th Cir.), cert. denied, 419 U.S. 830 (1974); cf. *United States* v. *Georgeoff*, 22 Env't Rep. Cas. (BNA) 1601, 1602 (1984). For this reason as well, civil penalties of the sort authorized by the Clean Water Act historically would have been awarded by an equity court, rather than a court of law.

3. Petitioner disregards these considerations in arguing that *all* actions to collect statutorily-created penalties are legal in nature. This contention simply fails to take account of the different types of money judgments rendered by the courts.[26] It undoubtedly is true that " 'where an action is simply for the recovery and possession of specific real or personal prop-

[26] In any event, as we explain above, the equitable nature of the cause of action here would defeat petitioner's claim for a jury trial even if the CWA's civil penalty remedy were characterized as legal.

erty, or for the recovery of a money judgment, the action is one at law.' " *Pernell*, 416 U.S. at 370 (quoting *Whitehead* v. *Shattuck*, 138 U.S. 146, 151 (1891)). At the same time, however, the Court has flatly rejected the proposition that "any award of monetary relief must necessarily be 'legal' relief." *Curtis*, 415 U.S. at 196. See *Katchen*, 382 U.S. at 336; D. Dobbs, *supra*, § 4.1, at 222-223. Nor is every pecuniary remedy created by statute "legal" within the meaning of the Seventh Amendment; the backpay awarded under Title VII, to give just one familiar example, is equitable in nature. See page 17 note 10, *supra*. In fact, petitioner's simplistic assertion rests on a basic misreading of the cases.[27]

[27] Although petitioner claims that civil penalties are closely analogous to "amercements" (Br. 19 & n.7), amercements in fact were "assessed by the peers of the delinquent, or the affeerors, or imposed arbitrarily at the discretion of the court or the lord." *Black's Law Dictionary* 107 (4th ed. 1968). Because a judge was empowered to assess the amercement *without* the aid of a jury, the practice associated with the levying of amercements provides no support for petitioner. Furthermore, although petitioner discusses amercements as they existed at the time of the Magna Carta in 1215 (Br. 19), it is clear that over the following 500 years amercements underwent a radical transformation. Specifically, amercements in postmedieval times involved fines imposed by the judge—without the assistance of a jury—on sheriffs or officers of the court for failure to perform their official duties. See *Sherman* v. *Upton, Inc.*, 242 N.W. 2d 666, 667 (S.D. 1976); *Rodgers* v. *Waters*, 2 Ala. 644 (1841); *Dawson* v. *Holcomb*, 1 Ohio 135 (1824); *Stansbury* v. *Patent Cloth Manufacturing Co.*, 5 N.J.L. 433 (1819). These specialized fines, imposed on officers of the court, hardly can be considered a close analogue to the civil penalties assessed against violators of the Clean Water Act.

It is established that actual and punitive damages are "the traditional form[s] of relief offered in the courts of law" (*Curtis*, 415 U.S. at 196 (footnote omitted)), along with money remedies in "action[s] on a debt allegedly due under a contract." *Dairy Queen*, 369 U.S. at 477. The courts accordingly have suggested that an action to collect a statutory penalty is analogous to a legal action for debt when—as in a contract action—the suit is for " 'a sum certain * * * due to the plaintiff, or a sum which can readily be reduced to a certainty.' " *United States* v. *Regan*, 232 U.S. 37, 41 (1914) (quoting *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 542 (1871)). See *Hepner* v. *United States*, 213 U.S. 103, 106 (1909). Virtually all of the decisions relied upon by petitioner for the proposition that statutory penalty actions should be tried to a jury (see Br. 19-24) accordingly involved attempts to collect fixed penalties of that sort; the amounts of the penalties in those cases were certain, either because they were statutorily set or because they were readily calculable from a fixed formula.[28] For example, the dictum in *Regan* and

[28] See *Calcraft* v. *Gibbs*, 5 Term. Rep. 19 (1792), in subsequent proceedings from 4 Term. Rep. 681 (1792) (fixed penalty under the statute of Anne); *United States* v. *Mundell*, 27 F. Cas. 23 (D. Va. 1795) (No. 15,834) (cited by petitioner as *United States* v. *Mulvaney*, Pet. Br. 20) (seeking fixed amounts); *United States* v. *Allen*, 24 F. Cas. 772 (D. Conn. 1810) (No. 14,431) (statute set penalties and forfeitures at multiple of the value of smuggled goods); *Jacob* v. *United States*, 13 F. Cas. 267 (E.D. Va. 1821) (No. 7,157) (imposing $500 penalty for each offense of repossessing stills from government revenue collector); *United States* v. *Bougher*, 24 F. Cas. 1205 (D. Ohio 1854) (No. 14,627) (failure to obtain license for operation of steamboat triggers penalty of $100 for each offense); *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 542-543 (1871) (statute imposes penalty for double the value of the goods illegally received under anti-smuggling statute); *Lees* v. *United States*, 150 U.S. 476, 478 (1893) (statutorily fixed penalty of $1,000). Petitioner also cites (Br. 22) two cases in which the Court evidently concluded that the statutory penalty was criminal in nature. *United States* v. *Zucker*, 161 U.S. 475 (1896); *Chaffee* v. *United States*, 85 U.S. (18 Wall.) 516, 536-537 (1873). Such decisions, of course, cannot control the interpretation of Seventh Amendment jury trial rights. See *Atlas Roofing Co.*, 430 U.S. at 460 n.15. In any event, the statutory penalty was set in those cases at the value of smuggled goods. See *Chaffee*, 85 U.S. (18 Wall.) at 538 ("The action of debt lies for a statutory penalty, because the sum demanded is certain").

The only case cited by petitioner that required a jury trial when the penalty involved a discretionary determination was *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), where a divided panel of the Second Circuit found a jury necessary in an action for civil penalties under Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*). But that decision relied in substantial part on congressional intent (see 498 F.2d at 425-427), and, in particular, made no other response to the government's argument that the Seventh Amendment is inapplicable when the civil penalty is left to the court's discretion (see *id.* at 427 n.15).

Hepner about the availability of a jury trial in statutory penalty actions,[29] upon which petitioner principally relies (see Pet. Br. 23-24), involved attempts to collect a penalty fixed by statute at $1000. See *Regan*, 232 U.S. at 47; *Hepner*, 213 U.S. at 104-105.[30]

[29] The Court subsequently has characterized that language of *Regan* and *Hepner* as dictum (see *Atlas Roofing Co.*, 430 U.S. at 449), and expressly has declined "to decide whether the dictum in these cases correctly divines the intent of the Seventh Amendment" (*id.* at 449 n.6).

[30] Indeed, the statute at issue in *Hepner* specifically provided that suits for the statutory penalty would proceed " 'as debts of like amount are now recovered in the courts of the United States' " (213 U.S. at 105 (quoting Act of Mar. 3, 1903, ch. 1012, § 5, 32 Stat. 1215)).

However analogous a penalty of that sort may be to a debt at law, penalties assessed under the Clean Water Act fundamentally differ from statutorily-fixed sums. Because, as we explain above, the amount of a CWA penalty turns on an exercise of the judge's discretion—and thus involves an assessment of the seriousness of the offense, the efficacy of other forms of relief, and the like—it plainly is neither a "sum certain" nor "a sum which can readily be reduced to a certainty." Indeed, to the extent that CWA money penalties have an objectively-calculable component, it is measured by the violator's profit. And that amount, as we have explained, is equivalent to "equitable" disgorgement rather than to "legal" debt.

C. A Jury Trial Is Not Required Even If The Civil Penalty Component Of A Clean Water Act Judgment Is Thought To Be Legal In Nature

1. Finally, even if the civil penalties here somehow were deemed legal in nature, petitioner still would not be entitled to a jury trial. It has long been settled that where "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to * * * award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399. See *Atlas Roofing Co.*, 430 U.S. at 453 n.10; *Curtis*, 415 U.S. at 196; *Katchen*, 382 U.S. at 338. The availability of legal relief as an incident to an equitable judgment is rooted in a long tradition, in both the public nuisance and other contexts. See generally 5 J. Pomeroy, *Equity Jurisprudence and Equitable Remedies* § 536, at 920 (1905) ("in addition to an injunction, damages for the past nuisance will be awarded" when necessary to provide complete relief). And as the Court has noted,

"[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell* v. *DeMario Jewelry Co.*, 361 U.S. 288, 291-292 (1960). See *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836). Where the public interest is directly implicated by the operation of a regulatory statute, the power to provide complete relief " 'assume[s] an even broader and more flexible character than when only a private controversy is at stake.' " *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398).

That the award of such complete relief "is within the recognized power and within the highest tradition of a court of equity" (*Porter*, 328 U.S. at 402) repeatedly has been acknowledged in the specific context of public nuisances resulting from water pollution. See *Missouri* v. *Illinois & Chicago District*, 180 U.S. 208, 244 (1901) (citation omitted) (resort to equity justified since court of law " 'could not remedy the whole mischief' " and equity could provide " 'a more efficacious and complete remedy' "). See also *Mugler*, 123 U.S. at 673 (collecting cases on public nuisances). And in other regulatory contexts, the Court has held that an equity court may compel the disgorgement of profits acquired in violation of statutory restrictions—even if such relief would have been available in a court of law. *Porter*, 328 U.S. at 398-399.

Here, the government plainly did invoke the equitable jurisdiction of the court for injunctive purposes. Like all suits under the CWA, this action ultimately was brought to "restore and maintain the * * * integrity of the Nation's waters." As we explain above

(at 19-22), jurisdiction historically lay in courts of equity to entertain such actions. And notwithstanding petitioner's assertion to the contrary (see Pet. Br. 16), at trial the government presented a comprehensive restoration plan addressing all of the filled properties (see Tr. 2220-2227).[31] In these circumstances, the district court was empowered to include a monetary award as an adjunct to equitable relief in an effort to provide a complete remedy.

2. Petitioner nevertheless insists (Br. 25-28) that, if CWA civil penalties are deemed to be "legal" remedies that are awarded as part of a package designed to provide complete relief, their availability must be determined by a jury prior to the award of equitable relief by a judge. Petitioner relies on the doctrine of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood, supra.* That doctrine, however, is inapposite here: it was developed as a response to problems that arose when distinct legal and equitable claims were litigated together.

[31] The plan was designed to yield maximum environmental benefits through use of restoration and mitigation, while at the same time avoiding any adverse effect on innocent third-party purchasers (Tr. 2221). For the Eel Creek and Mire Pond II sites, which had not yet been developed, the government proposed excavation of the filled areas down to the original elevation so that the wetlands would reestablish themselves (*ibid.*). For the violations at the Ocean Breezes sites, where development had occurred, the government proposed extensive mitigation in an adjacent area, including excavation, elimination of obstructions to tidal waterways, creation of a bridge-like structure spanning a waterway, removal of fill, cutting of a connection to an isolated pocket of marsh, and creation of a new tidal connection for the unlawfully filled 40-foot-wide waterway, Fowling Gut Extended. Petitioner presented no restoration plan of his own at trial. Thus, the government had formulated, presented at trial, and sought to have implemented a plan calling for substantial injunctive relief.

Prior to the merger of law and equity in 1938, when a case presented both legal and equitable claims the equitable claim could be tried first—even though the decision of the judge on issues raised in the equitable claim would collaterally estop the litigation of common issues raised in a subsequent legal action. See, *e.g.*, *Liberty Oil Co.* v. *Condon National Bank*, 260 U.S. 235 (1922). In 1959, however, this Court held in *Beacon Theatres* that when a prospective antitrust defendant sought a declaratory judgment to establish its innocence, and the prospective plaintiff counterclaimed for treble damages under the Clayton Act, 15 U.S.C. 15, the legal claim for treble damages would have to be tried first to preserve the right to trial by jury on that claim. 359 U.S. at 510-511. This Court reaffirmed *Beacon Theatres* three years later in *Dairy Queen*, where it explained that "legal claims involved in [an] action must be determined prior to any final court determination of * * * equitable claims." 369 U.S. at 479 (footnote omitted). See also *Ross*, 396 U.S. at 537-538. Under both decisions, however, the district judge retained a limited discretion to decline to order a jury trial before the bench trial of common issues. See 359 U.S. at 510.

As this Court has explained, these decisions were premised on the proposition that, when a case encompasses two causes of action, one legal and one equitable, the trial of any common issues before a judge sitting in equity would collaterally estop a subsequent trial of those issues before a jury hearing the legal claim. "Recognition that an equitable determination could have collateral-estoppel effect in a subsequent

legal action was the major premise of * * * *Beacon Theatres, Inc.* v. *Westover.*" *Parklane Hosiery Co.*, 439 U.S. at 333. See *Beacon Theatres*, 359 U.S. at 504. Thus, neither *Dairy Queen* nor *Beacon Theatres* purported to control the situation where only a *single* cause of action had been brought, but where both equitable and arguably legal *relief* was available. See Stumpff, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 Mich. L. Rev. 1950, 1969 n.144 (1985).[32] Indeed, since rendering the decision in *Beacon Theatres*, the Court has expressly reaffirmed the proposition that a court sitting in equity may award legal relief when necessary to provide a complete remedy. See *Katchen*, 382 U.S. at 339-340; *Mitchell*, 361 U.S. at 291-292.[33]

In the instant case, there is but a single cause of action under the Clean Water Act[34]—premised on

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[32] Similarly, this Court's decision in *Scott* v. *Neely*, 140 U.S. 106 (1891), upon which *Dairy Queen* was in part premised, held that an equity court lacked jurisdiction where " 'a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.' " *Dairy Queen*, 369 U.S. at 471 (quoting *Scott*, 140 U.S. at 117).

[33] Amicus Washington Legal Foundation contends (Br. 5) that the district court improperly relied on the "equitable cleanup" doctrine in this case, which it claims was repudiated in *Beacon Theatres*. This argument, however, confuses the cleanup doctrine with the authority of an equity court to award complete relief. The former doctrine goes to the equity court's jurisdiction to decide a legal cause of action or issues common to legal and equitable claims; the latter concerns an equity court's authority to award legal relief solely as an incident to remedying an equitable claim.

[34] The government's second complaint also stated a cause of action under the Rivers and Harbors Act. Because that

the charge that petitioner discharged fill material into navigable waterways without a permit—for which Congress has provided both injunctive relief and civil penalties. See 33 U.S.C. 1319(b) and (d). Because there is only one cause of action, there can be no second claim in this case in which collateral estoppel effects will be felt. See S. Rep. 99-50, 99th Cong., 1st Sess. 26 (1986) (specifying, in reauthorization of the Clean Water Act, that "if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed"). Thus, the doctrine of *Beacon Theatres* and *Dairy Queen* is inapplicable here.[35] As a result, in an essentially equitable Clean Water Act action, a court need not empanel a jury

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claim sought only injunctive relief (see J.A. 60)—indeed, the Rivers and Harbors Act does not specifically provide for civil penalties—there is no contention here that it was anything but equitable.

[35] Petitioner's suggestion (Pet. Br. 28-30) that the Clean Water Act creates two distinct causes of action finds no support in the plain language of the statute. Section 309(d), the provision allowing for civil penalties, merely states that a violator shall be subject to a civil penalty not to exceed $10,000 per day. 33 U.S.C. 1319(d). Standing alone, this provision supplies no cause of action. Section 309(d) only has meaning if it is incorporated into Section 309(b) (or into Section 505(a), 33 U.S.C. 1365(a), which authorizes certain citizen suits to enforce the CWA), which authorizes the EPA Administrator actually to "commence a civil action for appropriate relief, including a permanent or temporary injunction * * *" (33 U.S.C. 1319(b)). In any event, two causes of action can hardly be read into a statute that removes any distinction between the circumstances under which civil penalties and injunctive relief may be sought. See *Romero-Barcelo*, 456 U.S. at 320 (various forms of relief available interchangeably, subject to the discretion of the district court).

before awarding civil penalties (even if we assume that those penalties are legal in nature) as part of a package designed to provide complete relief against the violator.

In any event, even if the *Beacon Theatres* doctrine had relevance here—and if we again assume that CWA civil penalties are a form of legal relief—as a prudential matter it would be appropriate to decline to apply the doctrine. The Court has made it clear that the requirement that legal claims be tried before equitable ones is no "more than a general prudential rule." *Parklane Hosiery Co.*, 439 U.S. at 334. "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." *Katchen*, 382 U.S. at 339-340. This case presents such a situation. Requiring a jury trial on the availability of civil penalties prior to a determination of the propriety of equitable relief "is not consistent with the equitable purposes of" the Clean Water Act. *Id.* at 339. Because the court must determine in every CWA case what mix of remedies will provide the most efficacious relief, holding a prior jury trial directed only to civil penalties would "dismember a scheme which Congress has prescribed" (*ibid.*) . These circumstances would thus, in any event, call for a departure from the *Beacon Theatres* approach.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. The Government asserts that the Seventh Amendment right to trial by jury is automatically inapplicable if *either* the cause of action *or* the remedy is equitable in nature. *See* Gov't Br. at 10, 17. The Government, however, cites no decision of this Court as authority for this proposition. In considering the applicability of the Seventh Amendment to modern statutory enactments, this Court has not artificially dissected the statute into cause of action and remedy, but rather has considered more generally whether "the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). In doing so, the Court has emphasized that "[a]lthough the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." *Id.* at 193.

The Government attempts to defeat the right to jury trial in this case by artificially dividing the civil penalty action under the Clean Water Act into cause of action and remedy, and separately analyzing each component as if the other were irrelevant. Such a wooden approach leads to absurd results when, as here, a statute creates one cause of action but provides several distinct forms of relief. The Clean Water Act provides equitable, legal, and criminal relief. *See* 33 U.S.C. §§ 1319(b) (equitable), 1319(d) (legal), 1319(c) (criminal). The Government's characterization of the underlying cause of action as equitable cannot defeat the right to jury trial under the Seventh Amendment when the Government seeks what is plainly legal relief. Indeed, the Government's approach is belied by the well-established doctrine that the presentation of legal claims in equitable actions does not result in forfeiture of the right to jury trial. *See Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970) ("legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit"); *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916) ("penalty of triple damages" cannot be enforced "otherwise than through the verdict of a jury in a court of common law").

In *Curtis* v. *Loether*, *supra*, this Court emphasized that the nature of the relief was more significant than the cause of action in determining whether a modern statutory enactment implicated the right to jury trial preserved by the Seventh Amendment. In holding that an action under the Civil Rights Act of 1968 seeking injunctive relief and actual and punitive damages must be tried to a jury on demand, the Court stated that "this cause of action is analogous to a number of tort actions recognized at common law." 415 U.S. at 195. The Court went on to note: "*More important*, the relief sought here —actual and punitive damages—is the traditional form of relief offered in the courts of law." *Id.* at 196 (emphasis supplied). If the Government's approach of separately analyzing the cause of action and the remedy were the correct one, the nature of the relief in *Curtis* v. *Loether* could not have been "[m]ore important" than the nature of the cause of action in considering the applicability of the Seventh Amendment.

2. Even if the Government's approach were correct, Tull would still be entitled to trial by jury, because both the cause of action and the relief in this case are legal in nature. With respect to the cause of action, the Government contends that an action to recover civil penalties is most analogous to one to cure a public nuisance. This purported analogy overlooks the very question presented in this case—whether the Seventh Amendment applies when the Government seeks monetary penalties. For as the Government concedes the public nuisance cases on which it relies sought injunctive, not monetary, relief. Gov't Br. at 24 n.17. Tull does not dispute that if the Government sought only injunctive relief under 33 U.S.C. § 1319(b), he would not be entitled to a jury. The whole issue in this case, however, is whether Tull is entitled to a jury when the Government seeks monetary relief. In contending that public nuisance actions seeking only injunctive relief are the "closest historical analogue" to an action under the Clean Water Act seeking monetary relief, the Government simply ignores the key issue in the case.

The Government's analogy is also inapt because the District Court imposed civil penalties as punishment on Tull. *See, e.g.*, Pet. App. at 60a, 61a, 64a, 65a (District Court referring to civil penalty imposed on Tull as a "fine"). Under the cases cited by the Government, punishment in the form of civil penalties or otherwise was not a form of relief available to the equity courts to abate a public nuisance, absent contempt for failure to abide an injunction. Contrary to the Government's argument, courts of equity have never had inherent jurisdiction to impose penalties or forfeitures. *See, e.g.*,

Livingston v. *Woodworth*, 56 U.S. (15 How.) 546, 559-560 (1853); *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 453-455 (1854). Indeed, cases on which the Government itself relies, *see* Gov't Br. at 22-23, clearly state that equity jurisdiction is not available for punishment. *See, e.g., Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239 240 (1870) ("This Court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth"); *Attorney General* v. *Johnson*, 2 Wils. Ch. 87, 96 (1819) ("there are many precedents showing that you may proceed in [the court of Exchequer] not for punishment but for prevention"). Civil penalties are a form of punishment and were imposed as such in this case. Such punishment was not available in an equitable action to abate a public nuisance.

Quite apart from the foregoing, it is noteworthy that the public nuisance case on which the Government most heavily relies—*Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames. Eq. Jur. 615 (1795), *see* Gov't Br. at 22—actually supports Tull. The equity court in that case upheld its jurisdiction to issue a decree of abatement at the request of the Crown, but *only* on the ground that the Crown held title to the land at issue. The court conceded that it might *not* have the authority to issue the decree on the ground of nuisance only, "at least not without the intervention of a jury." 2 Anst. at 615.[1] The

[1] As the court stated:

> But it is argued, that the prayer of the bill being to abate the erections as a nuisance, the Court can only consider that question, as alone supporting the relief prayed; and it is contended, that this Court cannot give such a decree, or at least not without the intervention of a jury, the question of nuisance being, as laid down by Lord Hale, a question of fact, and not of law. *That may be, where the question is of nuisance only, and the evidence doubtful.* But the cases cited * * * clearly prove, that where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it. [2 Anst. at 615-616 (emphasis supplied).]

That the case turned on the ownership of the land by the Crown is clear from the concluding sentence of the opinion, in which the court stated, "we do not hesitate to declare, that the soil is the property of the Crown; and of course, to decree, that these buildings be abated." *Id.* at 616.

facts of *Richards* are thus clearly not "remarkable similar" to those of the present case, Gov't Br. at 22, since Tull—not the Government—owns the land at issue. Nor is the question in *Richards* at all similar to that in this case, since there was in *Richards* no question of monetary relief. Finally, the opinion in *Richards* strongly supports Tull, since it suggests that if the Crown did not own the land and sought relief on the basis of nuisance only, "the intervention of a jury" would be required.

As detailed in petitioner's opening brief, a civil penalty action is most analogous not to a public nuisance action seeking no monetary relief, but rather to historic actions by the government to collect a penalty. *See* Pet. Br. at 18-25. Such actions were suits at common law, tried as ordinary actions in debt. *See, e.g., Lees v. United States*, 150 U.S. 476, 479 (1893) ("the recovery of a penalty * * * may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil court"). In any such case "[t]he defendant was, of course, entitled to have a jury summoned * * *." *Hepner* v. *United States*, 213 U.S. 103, 115 (1909).

3. The Government also errs in contending that monetary civil penalties are equitable rather than legal relief. Monetary relief is, of course, the prototypical relief afforded by a court of law, as injunctive relief is the prototypical relief afforded by a court of equity. The Government seeks to overcome the logical conclusion that the

monetary relief of a civil penalty is a legal remedy by arguing that the amount of the penalty is not fixed. Gov't Br. at 34-36. The amount of punitive damages awardable under the statute at issue in *Curtis* v. *Loether*, *supra*, was also not fixed, but that did not prevent this Court from holding that such relief, together with actual damages, "is the traditional form of relief offered in the courts of law," triggering the right to jury trial. 415 U.S. at 196. As explained in petitioner's opening brief, at 34-35, juries routinely fix penalties from a broad range of possibilities, under appropriate instructions. There is no reason why this should be any different with respect to the amount of civil penalties under the Clean Water Act.[2]

The Government contends that there can be no right to a jury in this case because the amount of any monetary relief depends on the exercise of discretion, and only a judge sitting in equity can exercise such discretion. Gov't Br. at 26-29. This argument was made at some length by the petitioner in *Curtis* v. *Loether*, and not accepted by this Court.[3] Particularly where the amount

[2] The Government's suggestion that the EPA Penalty Policy somehow evinces congressional intent to restrict the right to jury trial is wholly unfounded. *See* Gov't Br. at 26-27. The Penalty Policy was not even formulated by the EPA until 1977—five years *after* enactment of the statute at issue here—and there is no evidence in the legislative history of amendments to the statute remotely implying that Congress viewed the Policy as precluding the right to a jury trial.

[3] The remarkable similarity between the Government's arguments in this case and the unsuccessful arguments of petitioner in *Curtis* v. *Loether* is underscored by comparing the Government's Brief, at 28-29, with the following passage from Brief for Petitioner, *Curtis* v. *Loether*, at 37-39:

> There is no absolute right to actual or punitive damages such as existed at common law, for these matters are entrusted to the discretion of the court. * * * Congress intended that the forms of relief authorized by Title VIII be employed as part of a single interrelated equitable remedy, and the significance for Seventh Amendment purposes of any relief awarded must be assessed in this context. Where the statute contemplates that actual or punitive damages will only be awarded at the court's discretion and in light of its decisions as to injunctive relief, it would be error to attempt to evaluate the legal or equitable nature of such damages in isolation from such discretion and decisions. In granting relief under the analogous provisions of Title VII, the courts have used great flexibility in devising remedies to eradicate employment discrimination, and this remedial arsenal has been held to be equitable, even when a monetary award is made in a particular case. * * * Considered as part of a single integrated equitable remedy, the relief in any particular case is *ipso facto* equitable and does not give rise to a right of trial by jury.

of penalties that may be imposed in the exercise of discretion is so staggering—up to $22 million in this case—the protection of having a jury rather than a single judge exercise that discretion is all the more necessary.

The Government also contends that the monetary relief awarded in this case did not trigger the Seventh Amendment right to jury trial because the relief was analogous to disgorgement. Gov't Br. at 31-32. There is, however, nothing in the civil penalty provision of the Clean Water Act suggesting that such penalties should be limited to disgorgement, or that disgorgement is an appropriate measure of the amount of penalty. The record in this case also refutes the Government's attempted analogy. The District Court acknowledged that Tull received no profit from filling numerous lots in Mire Pond I and Mire Pond II, but nevertheless imposed a $35,000 fine for this filling. Pet. App. 60a. The District Court imposed a civil penalty of $5,000 for Tull's filling the property at Eel Creek even thoungh Tull had not sold this property at any profit at all. *Id.* at 36a, 60a. The District Court did not equate the amount of the civil penalties imposed to any profit received by Tull, and clearly

intended not simply to disgorge profit but to impose punishment. Tull was fined for filling land for which he received *no profit*, and the Government's argument that the imposition of civil penalties constituted equitable disgorgement is thus unsupported not only by the statute but by the record as well.

4. The Government contends that Tull should be denied his Seventh Amendment right to a jury trial on the Government's claim for monetary relief because such relief was "an adjunct to equitable relief." Gov't Br. at 38. Even if a potential penalty of $22 million and an actual penalty in excess of $300,000 can be considered a mere "adjunct" to equitable relief—rather than vice versa—the Government's attempt to revive the "equitable clean up doctrine" in this context is contrary to the teachings of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962). In those cases this Court affirmed that the Seventh Amendment right to jury trial on legal claims could not be defeated simply because such claims were combined with claims for equitable relief.

As the Court stressed in *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970), "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." If an action by the Government seeking civil penalties is legal in nature—as Tull maintains, and as the Government assumes for purposes of its "adjunct" argument, *see* Gov't Br. at 36—surely the Government cannot defeat the Seventh Amendment right that attaches to such a claim by the simple expedient of appending a catch-all claim for any equitable relief that may be appropriate. This is particularly true when, as here, any claim for equitable relief was largely moot from the outset. *See* Pet. at 3 & n.1.

5. The Government concludes its brief by arguing that the Court should decline to find the Seventh Amendment applicable in this case "as a prudential matter." Gov't Br. at 42. The Government's position is not unlike that of the Crown in the Eighteenth Century, which sought to deny the colonists their right to trial by jury by employing vice-admiralty courts, in which the jury trial right did not exist. This deprivation of the jury trial right was specifically mentioned in the Declaration of Independence[4] and led to resistance to ratification of the Constitution until a commitment to preserve the right to trial by jury was made.[5]

This commitment is embodied in the Seventh Amendment and should not be disregarded because of the Government's assertion that interposing a jury between the citizen and the imposition of millions of dollars in penalties would interfere with the efficient implementation of a congressional scheme. The Government does not satisfactorily demonstrate how denial of trial by jury will frustrate the objectives of the Clean Water Act. Civil penalties will continue to be available under the Act, assessed by a jury and not a judge as required by the Seventh Amendment. The Government is free to seek and the court free to impose any equitable relief that may be appropriate without the "interference" of the jury. This Court has consistently refused to dispense with constitutional rights upon the Government's assertion that it is necessary for governmental efficiency. *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). As the Court concluded in *Curtis* v. *Loether*, 415 U.S. at 198, such "considerations are insufficient to overcome the clear command of the Seventh Amendment."

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[4] "For depriving us, in many cases, of the benefits of Trial by jury." The Declaration of Independence para. 20 (U.S. 1776).

[5] *See The Federalist* No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

For the foregoing reasons, and those in petitioner's main brief, the judgment below should be reversed.

Respectfully submitted,

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No. 85-1259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the defendant is entitled to a jury trial under the seventh amendment to the U.S. Constitution in a civil action initiated by the Government in federal district court to recover substantial civil penalties pursuant to a federal statute.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the written consent of all parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner. The Chamber is the nation's largest federation of businesses. It represents more than 180,000 companies as well as several thousand trade and professional associations, and state and local chambers of com-

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[1] The consent letters have been filed with the Clerk of the Court.

merce. Nearly every one of the Chamber's members is regulated in some fashion by the United States Government under a statute through which civil penalties may be imposed in a United States district court action.

In the last fourteen years, the regulated business community has seen a sevenfold increase in the number of federal statutes under which the United States Government may impose civil penalties. The advantage to the government in pursuing regulatory enforcement actions under these schemes is clear: civil penalty prosecutions do not entail the same constitutional protections for the defendant that are available in a criminal proceeding. Thus they do not impose procedural "obstacles" such as grand jury proceedings, indictments, and discovery. Civil penalty prosecutions also require less rigorous application of due process protections such as statutes of limitation. Moreover, the government's burden of proof in a civil penalty proceeding is far less onerous. However, the procedural protection of trial by jury, as required by the seventh amendment, serves to ensure citizen involvement in the prosecutorial process, and thus is a vital protection from arbitrary government action against the defendant.

As this case demonstrates, the consequences of a civil penalty proceeding are severe. The Petitioner has noted that the maximum penalty which could have been imposed against him under the Federal Water Pollution Control Act ("Clean Water Act" or "Act") would have exceeded $22 million. Petition for Certiorari at 6. In cases such as this, the right to a jury trial under the seventh amendment stands as the only meaningful opportunity for citizens to scrutinize government discretion. If the erroneous decision of the Fourth Circuit is not reversed, prosecutorial authorities in the future will be given complete discretion to escape the reach of this fundamental constitutional protection merely by electing to proceed under civil penalty provisions.

STATEMENT OF THE CASE

This case arises out of a civil penalty prosecution under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. II 1984). Petitioner Edward Lunn Tull is a developer of residential properties on the island of Chincoteague in southeast Virginia. The Government's complaint alleged that Tull had filled wetlands, as defined by 33 C.F.R. § 323.2(c), adjacent to navigable waters in violation of the Act.

Tull's demand for a jury trial under the seventh amendment was denied by the United States District Court for the Eastern District of Virginia. Trial on the merits began in July 1982. After the Government rested its case, Tull sought a partial directed verdict. The Government then was permitted to amend its complaint to allege a violation of 33 U.S.C. §§ 403 and 406 (River and Harbor Act). Tull's defense of equitable estoppel was rejected.

The district court, which found a violation of the Act, ordered Tull to pay a "penalty or civil fine" under § 1319(d) of the Act in the amount of $325,000. The district court offered Tull the option of obtaining a suspension of $250,000 of the fine if he would restore the drainage ditch to its original condition. Tull's petition to relocate the drainage ditch to an alternative location, on the ground that restoration of the original ditch was impossible because he had sold the land to third parties, was refused by the district court. Additionally, the district court ordered restoration of a portion of the land by the removal of fill material.

The United States Court of Appeals for the Fourth Circuit affirmed the district court in a two-to-one decision. The majority held that the seventh amendment did not apply to this civil penalty proceeding and also rejected Tull's claim of equitable estoppel. The dissenting

member voted to reverse on both grounds. Tull's petition for rehearing *en banc* was denied by a vote of six-to-five. No. 84-1766 (4th Cir. Oct. 30, 1985). The Court granted certiorari on May 27, 1986. 54 U.S.L.W. 3777.

SUMMARY OF ARGUMENT

The right to jury trial contained in the seventh amendment to the U.S. Constitution for those charged with civil penalties under federal regulatory statutes should be preserved as a protection against arbitrary governmental action.

Supreme Court precedent supports the right of a jury trial in civil penalty cases under federal statutes where a system of administrative agency adjudication has not been established by Congress. The federal statute involved in this case, the Clean Water Act, vests enforcement adjudication in the district courts of the United States. 33 U.S.C. § 1319. Therefore, the seventh amendment right to a jury trial should apply to enforcement actions at law under the Clean Water Act. Moreover, civil penalties are within the scope of the seventh amendment's protection because they are remedies at law as opposed to equitable remedies. Civil penalties do not lose their status as legal remedies simply because they may be imposed in combination with equitable remedies such as injunction.

The lower court in this case erroneously denied Petitioner his right to a jury trial by mistakenly interpreting Supreme Court precedent and by incorrectly construing the Clean Water Act's civil penalty as an equitable remedy. The Court should reverse these erroneous interpretations of constitutional and statutory law and provide the Petitioner, charged with a civil penalty under the Clean Water Act, the jury trial to which he is entitled under the seventh amendment.

ARGUMENT

I. THE SEVENTH AMENDMENT TO THE CONSTITUTION GUARANTEES THE RIGHT TO A JURY TRIAL IN CASES WHERE A CIVIL PENALTY HAS BEEN ASSESSED PURSUANT TO A FEDERAL STATUTE

The seventh amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

This is a fundamental protection of the Bill of Rights and is one of the cornerstones of our judicial system. Thus, the decision of the U.S. Court of Appeals for the Fourth Circuit curtailing the right to a jury trial should be scrutinized with the utmost care. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (quoted with approval in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)).

A. The Right To A Jury Trial In Civil Penalty Cases Is Necessary To Protect Citizens From Arbitrary Government Action

With the proliferation of civil penalty provisions in federal regulatory statutes, this nation's regulated business community is seriously affected by any curtailment of procedural protections which act as a check against arbitrary prosecution.[2] *Amicus curiae* thus urges the Court to maintain the integrity of the seventh amendment right to jury trial by recognizing its applicability in civil penalty cases.

Moreover, *amicus* is greatly troubled that a curtailment of the right to jury trial in civil penalty cases, such as the one at bar, will encourage the government to choose

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[2] Petitioner has identified 225 federal statutes, all but 30 of which have been enacted since 1972, that provide for the imposition of civil penalties by the government. Petition for Certiorari at 16.

arbitrarily which type of penalty to seek, civil or criminal, against the business community in order to circumvent the procedural protections afforded the defendant. The Constitution does not permit the government to determine a defendant's procedural protections, and the Court should not allow such a result to occur.

Amicus acknowledges that recognition of the right to a jury trial in this case could increase the number of jury trials in the district courts. Nevertheless, as the Court has previously noted, such a concern over judicial workload, albeit important, cannot be permitted to override the concerns underlying the seventh amendment. *Curtis v. Loether*, 415 U.S. 189, 198 (1974). Moreover, little real increase in the district court docket will occur. Cases prosecuted under the statutes in question still would be brought in the district court regardless of whether they are tried before a jury. In many of these cases, the defendant likely will not elect a jury trial.[3] And the judge in a jury trial proceeding still retains the authority to grant summary judgment or a directed verdict in appropriate cases, thus reducing the potential burden of increased jury trials. *See Pernell v. Southall Realty*, 416 U.S. 363, 384-85 (1974).

B. Supreme Court Precedent Supports The Right To Jury Trial In A Civil Penalty Case Under The Clean Water Act

The right to a jury trial in civil penalty cases is fully consistent with the precedents established by the Court in previous seventh amendment cases.[4] The Court has

[3] For example, in the environmental cases under statutes which comprise a substantial number of those providing for civil penalties, a corporate defendant assessed a civil penalty would likely prefer a bench trial.

[4] The Court previously has reserved the precise question whether a right to jury trial exists in civil penalty cases. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 449 n.6 (1977).

held that Congress, without contravening the right to jury trial, may provide for adjudication of statutory claims by an administrative agency without a jury. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). But where Congress has not so specifically provided, the right to jury trial is retained. *Pernell v. Southall Realty*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 195.

Congress did not construct a system of administrative agency adjudication under the civil penalty provision of the Clean Water Act, 33 U.S.C. § 1319(d). Rather, it expressly committed this adjudication to federal district court where, pursuant to Federal Rule of Civil Procedure 38(a), the seventh amendment right to a jury trial is applicable. Congress has provided for administrative adjudication procedures under other statutes and plainly could have done so under the Clean Water Act had it desired. The fact that Congress enacted no such provision in this case indicates its intent to retain the procedural protections, including the right to a jury trial, incident to district court jurisdiction.

Moreover, previous decisions of the Court have strongly implied that defendants in civil penalty cases are entitled to a jury trial. *See, e.g., Hepner v. United States*, 213 U.S. 103, 115 (1909) (civil penalty under § 5 of Alien Immigration Act); *United States v. Regan*, 232 U.S. 37, 47 (1914) (civil penalty under § 5 of Alien Immigration Act); *Atlas Roofing*, 430 U.S. at 460 (civil statutory fines enforceable through administrative agency or judiciary; if judiciary, *Hepner* and *Regan* support jury trial requirement).

By the terms of the seventh amendment, the right to a jury trial extends to civil cases at law as opposed to actions in equity.[5] Civil penalties are legal remedies, not

[5] It is a well settled principle that the right to a jury trial is not restricted to the common law actions that existed at the time

equitable ones. A civil penalty's closest analog is punitive damages which are, of course, legal in nature and triable to a jury. *See Curtis v. Loether*, 415 U.S. 189, 196 (1974). The purposes of punitive damages are to deter future conduct of the same type and to punish the responsible party by exacting a sum of money, often a large sum, from him. *Id.* These are exactly the purposes of a civil penalty—deterrence and punishment. Civil penalties, in essence, are statutory provisions for punitive damages. Therefore, civil penalties are legal in nature and fall within the protection of the seventh amendment.

Amicus recognizes that not all monetary claims are causes of action at law. *See Curtis v. Loether*, 415 U.S. at 196. Restitution, for example, can be monetary relief but is equitable in nature as it seeks to return to an injured party something that rightfully belongs to him. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). Restitution thus is significantly different from a civil penalty awarded under a statute. *Id.* A civil penalty does not contain the element, characteristic of equitable relief, of returning something to a party of which he was wrongfully deprived. Rather, a civil penalty imposes a punishment on a party by requiring him to disgorge a monetary sum and is therefore characteristic of a remedy at law.

Petitioner's right to a jury trial in this case thus is not defeated merely because remedies equitable in nature—an injunction and restoration of land—were sought

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of the seventh amendment's enactment. *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Pernell v. Southall Realty*, 416 U.S. 363, 374 (1974). The seventh amendment does apply to causes of action created by statute. *Id.* To the extent that any language in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937), contradicts this principle, such language has been disapproved by the Court's subsequent cases. And to the extent that the lower court below and the Government rely on the discredited notion that a cause of action unavailable under the common law of 1791 does not qualify for a jury trial, they are clearly in error.

by the Government in addition to the civil penalty. When equitable and legal relief are joined in one action, the seventh amendment right to jury trial is preserved with respect to the legal claim. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Ross v. Bernhard*, 396 U.S. 531 (1970). Moreover, it is irrelevant to the jury trial issue whether the legal remedy sought can be characterized as incidental to the equitable relief. *Dairy Queen*, 369 U.S. at 470; *Ross*, 396 U.S. at 537. Any language to the contrary contained in the Court's early decision of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), has clearly been disapproved by the subsequent decisions of the Court quoted above.

C. The Fourth Circuit's Denial Of Petitioner's Right To Jury Trial Is Erroneous

The Fourth Circuit's denial of a right to jury trial in this case, based on its view that the civil penalty "intertwines" with the equitable relief sought, *United States v. Tull*, 769 F.2d 182, 187 (4th Cir. 1985), is plainly in error. The Fourth Circuit supported its "intertwining" theory with an erroneous interpretation of prior Supreme Court cases: (1) *Jones & Laughlin*, 301 U.S. at 48, whose language on legal remedies being "incidental" to equitable remedies has been disapproved by *Beacon Theatres* and *Dairy Queen* (neither of which were cited or distinguished by the lower court); and (2) *Atlas Roofing*, 430 U.S. at 453, which only quoted the language of *Jones & Laughlin* to decide the issue of NLRB's power to order back pay and not to decide whether a right to jury trial existed.

Furthermore, the Fourth Circuit's alternate ground for denying Petitioner's right to jury trial, that the civil penalty in this case is not a set amount but rather a maximum amount subject to precise determination at trial, is unsupported by any prior precedent of this Court.

Indeed, the lower court did not cite any precedent to support its view because none exists. Nor is the Fourth Circuit's view supported by a reasoned analysis of the nature of provisions for civil penalties or the nature of civil damages. The precise amount of damages to be awarded in a civil suit at law (compensatory or punitive), regardless whether a set amount is demanded in the complaint, is an issue to be determined by the jury. The fact that discretion must be exercised to determine the precise amount of recovery does not convert the remedy of compensatory or punitive damages into an equitable proceeding triable without the right to a jury trial. *See United States v. J.B. Williams Co.*, 498 F.2d 414, 427 n.15 (2d Cir. 1974). Similarly, the fact that the precise amount of a civil penalty is not stated in the statute, but is discretionary, does not convert the civil penalty into an equitable remedy for which no jury trial is available.

Neither can a civil penalty under § 1319(d) of the Clean Water Act be converted into an equitable remedy by reference to those equitable remedies that *are* available under the Act—injunction and "appropriate relief" as stated in § 1319(b) and § 1319(f). The Act itself distinguishes civil penalties from equitable remedies by placing civil penalties in a separate section of the enforcement provisions available under the Act. Nothing in the remainder of the Act or its legislative history indicates any intention that civil penalties are to be considered part of this Act's equitable remedies.

In addition, civil penalties under the Act cannot be converted into equitable remedies by vague references to the general "equitable" goals of the Act, defined in § 1251 as restoring and maintaining the integrity of the nation's waterways. Virtually all regulatory statutes have goals that are "equitable" in the sense of accomplishing a just regulatory purpose. But if this general principle of regulatory law is inappropriately extended so as to view *all*

remedies available under a particular statute as "equitable," then every statute becomes an equitable one and the protection inherent in the seventh amendment's right to jury trial becomes meaningless.

This is precisely the flaw in the reasoning of *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3533 (U.S. Jan. 30, 1986) (No. 85-1292), which the Government cited to support its position in the instant case. In *M.C.C.*, the Eleventh Circuit erroneously denied the right to a jury trial for civil penalties under the Clean Water Act and the River and Harbor Act because it considered these statutes "equitable in nature." 772 F.2d at 1506-07. Although these statutes do permit equitable remedies to be available, and although these statutes embody "equitable" goals, their civil penalty provisions retain the distinct character of remedies at law by virtue of their deterrent and punitive purposes. The Court should not allow the Eleventh Circuit's erroneous interpretation to the contrary to stand.[6]

In contrast to the *M.C.C.* decision, the Second Circuit in *United States v. J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), comprehensively and persuasively analyzed

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[6] The Government also cites the Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as support for construing the civil penalties of the Clean Water Act as equitable. This is plainly wrong. The Government erroneously characterizes the holding as follows: "a district court in a Clean Water Act proceeding is called upon to exercise its 'traditional equitable discretion in enforcing the statute.'" Brief for the United States in Opposition ("Brief in Opposition") at 7. However, the limited holding in the *Romero-Barcelo* case was actually that the Clean Water Act *allowed* a court to exercise equitable discretion in determining whether to enjoin or order other equitable relief to correct a violation of the Act's water pollution permit requirements. This is distinguishable from, and not supportive of, the contention that the Clean Water Act is entirely an "equitable" statute such that all its remedies, including civil penalties, are equitable in nature.

the nature of civil penalties imposed under federal statutes[7] to hold that the right to jury trial is preserved in these cases. The Second Circuit applied the precedents of this Court in *Hepner*, *Regan*, *Curtis v. Loether* and *Southall Realty*, and determined that an action to recover a statutory penalty carries the right to jury trial, irrespective of whether the statutory penalty is a fixed amount or a variable amount with a stated maximum. 498 F.2d at 426-27. The Court should apply the thoughtful reasoning of Judge Friendly in the *J.B. Williams* case to the case at bar and hold that the remedy of a civil penalty retains the right to a jury trial.[8]

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[7] The specific statutory civil penalty provision involved in the *J.B. Williams* case was § 5(e) of the Federal Trade Commission Act, 15 U.S.C. § 45(e).

[8] The Government weakly attempts to dismiss the *J.B. Williams* case because the statute in that case was not the Clean Water Act and it provided only for civil penalties, not a "package" of remedies. Brief in Opposition at 9 n.12. This is not persuasive for several reasons. First, the reasoning of the *J.B. Williams* case with respect to civil penalties was clearly general in nature and not specific to the civil penalty of the Federal Trade Commission Act. Second, as discussed *supra* pp. 8-9, whether a civil penalty is part of a "package" of remedies is not determinative of the right to a jury trial.

Moreover, to the extent that the Government relies on two district court cases to support the proposition that Clean Water Act enforcement actions do not carry a right to jury trial, Brief in Opposition at 5 n.5, *amicus* submits that these two cases are in error. The first, *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830, 839 n.13 (E.D. Pa. 1977), *aff'd without opinion sub nom. United States v. Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978), characterized this Court's decision in *Atlas Roofing*, 430 U.S. 442 (1977), as a denial of a claim for a jury trial under a civil penalty provision, in order to deny Atlantic a jury trial. This is patently incorrect; the *Atlas Roofing* case held that Congress could establish administrative adjudication plans and explicitly left open the jury trial issue. 430 U.S. at 449 n.6. The second case, *United States v. Lambert*, 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983), an unpublished decision not entitled to precedential weight, erroneously characterized a civil penalty under the Clean Water Act as an equitable remedy because the amount is not fixed and its purpose is deterrence. As discussed *supra* pp. 8-10, neither of these criteria correctly characterizes an equitable remedy.

In addition, the Government's position that no factual issues suitable for jury trial are raised in this case is incorrect. Although *amicus* was not involved in the trial of this case, it understands that the case required a fifteen-day trial and that over thirty witnesses were heard. The district court's opinion contains extensive findings of fact, 615 F. Supp. at 613-20, and indicates that the trial required an on-site viewing of the property that is the subject of this case.

II. CONCLUSION

For these reasons and those stated in Petitioner's Brief, the decision of the court below should be reversed.

Respectfully submitted,

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August 11, 1986

No. 85-1259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, ARKANSAS TRIAL LAWYERS ASSOCIATION, GEORGIA TRIAL LAWYERS ASSOCIATION, ILLINOIS TRIAL LAWYERS ASSOCIATION, OKLAHOMA TRIAL LAWYERS ASSOCIATION, OREGON TRIAL LAWYERS ASSOCIATION, PENNSYLVANIA TRIAL LAWYERS ASSOCIATION, WESTERN TRIAL LAWYERS ASSOCIATION, WISCONSIN ACADEMY OF TRIAL LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the defendant in a civil action instituted by the Government in a Federal District Court to recover substantial civil penalties (in this case the penalties sought were in excess of $22,000,000 and penalties received in excess of $300,000) under a federal statute is entitled to a trial by jury under the Seventh Amendment of the Constitution.

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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2 the Virginia Trial Lawyers Association, the Association of Trial Lawyers of America and the above-listed organizations file

this brief as amici curiae in support of the petitioner. Letters of consent from counsel for the parties have been filed with the clerk. The Trial Lawyers organizations are non-profit membership organizations dedicated to the advancement of the legal profession and the protection of the legal rights of all citizens of the United States and the states in which they reside. Their combined membership of more than 100,000 members regularly participate in trials in state and federal courts. Individually and collectively amici curiae are concerned for and intimately involved in the protection of litigants' constitutional rights, including their right to trial by jury. The Associations are compelled to speak out in this case which has resulted in the denial of the right to trial by jury to petitioner, a citizen of the Commonwealth of Virginia, by a Federal District Court.

Members of amici curiae and the citizens they have represented in the past, those they currently represent, and those they will represent in the future have a substantial interest in the preservation of the right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States. They will be adversely affected by a judicial decision which removes from this guarantee bestowed upon us by our forefathers the right of a citizen to be tried by a jury of his peers when government seeks to impose substantial civil penalties for the violation of a statute. The civil penalty provisions of the statute applicable in this case, and similar statutes of recent origin, can produce an end result just as devastating to the litigant as prosecution under the criminal penalty provisions.[1] It makes little difference that the citizen cannot be deprived of his liberty, when his government can destroy him economically and, as a result, he loses all of his wordly possessions.

[1] Petitioner cites approximately 195 federal statutes enacted since October 18, 1972 which permit the government to seek civil penalties in the courts. (Pet. 16 and Pet. App. 82a-100a).

STATEMENT

The Seventh Amendment to the Constitution of the United States guarantees the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars. The Court of Appeals in a two to one decision held that petitioner did not have a Seventh Amendment right to trial by jury in this case in which civil penalties in the amount of $325,000.00 were imposed by the District Court.[2] (Pet. App. 8a) Judge Warriner, dissenting, would have held the Seventh Amendment applicable and a jury trial required. (Pet. App. p. 19a-25a) Regrettably, the majority decision was not examined by the full court. The Petition For Re-Hearing En Banc was denied by a six to five vote. (Pet. App. 26a)

The decision of the court below frustrates the clear intent of the Seventh Amendment to the Constitution of the United States and several prior decisions of this Court. While these grounds are amply explained in the brief of the petitioner, amici curiae submit this brief to amplify several points, primarily the impact of the Court of Appeals decision on the members of amici and the citizens whose interests they represent.

SUMMARY OF ARGUMENT

We believe that the panel below misinterpreted prior decisions of this Court concluding that Congress could assign and vest in an administrative agency the right to find facts and assess penalties without violating the Seventh Amendment. Such an application of the previous decisions of this Court is an erroneous application to this case since the Clean Water Act did not provide for fact finding or penalty assessments by an administrative

[2] We have accepted petitioner's explanation that because he cannot restore the ditch to its original condition, having sold the property to others prior to any government action, his civil penalty will be $325,000.00 and not $75,000.00. (Pet. 7 note 9)

agency. The Act clearly provided that suits under the Act were to be brought in District Court. The panel below further disregarded centuries of judicial history and a substantial body of law that a suit for civil penalties is an action at law and clearly a right or remedy of the "sort typically enforced in an action at law" and erroneously concluded that the civil penalties constituted equitable relief when in fact such civil penalties are clearly "legal relief".

The decision of the Court of Appeals represents in our view a very substantial and dangerous diminution of the right to trial by jury in America. We agree with Judge Warriner's dissent that "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of citizenry of this nation." (Pet. App. p. 25a).

We note with concern the proliferation of statutes containing civil penalties and the government's option to elect proceeding under civil penalty provisions rather than criminal penalty provisions thus avoiding the more onerous burden of proof beyond a reasonable doubt required in criminal prosecution, permitting pretrial discovery against a defendant, and avoiding the Constitutional protections of the Fifth Amendment. To remove the last protection, the right to trial by jury, is an effective erosion of the congressionally intended distinction between a civil suit and a criminal prosecution. The difference will become of small importance to a defendant who would in fact be better off if prosecuted criminally.

ARGUMENT

A. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY ON THE GROUND OF CONGRESSIONAL DELEGATION TO AN ADMINISTRATIVE AGENCY WHEN NONE EXISTED UNDER THE CLEAN WATER ACT.

We believe that the majority of the Court of Appeals has erroneously interpreted prior decisions of this Court. The majority of the panel in the court below held that petitioner was not entitled to a jury trial because this Court in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), left open the question of whether the Seventh Amendment has any application at all to government litigation. *Id.* at 449 n.6 (Pet. App. 9a) The majority's reliance upon precedent which established at most the limited proposition that Congress may vest in an administrative agency the right to find facts and assess a penalty without violating the Seventh Amendment disregards the facts of this case. In *Atlas Roofing Co.*, this Court held that the Seventh Amendment does not "prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." 430 U.S. at 450. In *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974), this Court made it clear that its prior decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), simply meant that the Seventh Amendment is generally inapplicable to administrative proceedings. The facts of the instant case do not support the majority's application of the law. Suit was initiated against petitioner in the District Court, not in an administrative agency. (Pet. App. p. 67a-74a) Congress did not provide for factfinding to be done or civil penalties to be assessed by an administrative agency under the Clean Water Act. To the contrary, Congress required in 33 U.S.C. Section 1319(b) that suits under the Clean Water

Act be brought in the District Courts. (Pet. App. p. 76a-77a) The District Court, not an administrative agency, imposed the $325,000 civil penalty against petitioner. This Court made it clear in *Atlas Roofing Co.* that under facts similar to those here, a jury is required.[3] 430 U.S. at 460.

The majority's reliance upon *Atlas Roofing*, *supra*, and *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*, for the proposition that the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted, disregards this Court's clear pronouncement in *Curtis* v. *Loether*, *supra*, that the jury trial right is not so limited. The majority of the panel below was simply wrong.

This Court as early as 1830 in *Parson* v. *Bedford*, 28 U.S. 433, 446-447 (1830), and as recently as 1974 in *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974), said that the right to trial by jury is not limited to actions at common law existing at the time of adoption of the Seventh Amendment. In *Curtis* v. *Loether*, 193, *supra*, this Court reaffirmed the basic principle enunciated by Mr. Justice Story in 1830 that, "although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of actions recognized at that time." The majority below also failed to appreciate the importance of not only the cause of action existing when the amendment was adopted, but also whether the relief existed at that time. Mr. Justice Marshall, ex-

[3] "That case indicates, as had *Hepner* v. *United States*, 213 U.S. 103, 53 L.Ed. 720, 29 S.Ct. 474 (1909), *that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary in which event Jury Trial would be required*, see also *United States* v. *Regan*, 232 U.S. 37, 58 L.Ed. 494, 34 S.Ct. 213 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials." *Atlas Roofing Co.*, 430 U.S. to 460 (emphasis added).

pressing the unanimous view of this Court in *Curtis* v. *Loether*, *supra*, at 195, states ". . . a jury trial must be available if the action involves *rights and remedies of the sort typically enforced in an action at law.*" (emphasis added).

The majority of the panel below thus disregarded over nine centuries of judicial history that, without question, a suit for civil penalties is "an action at law." The right to trial by jury in cases of civil penalties was obtained in the great charter of English liberties of 1215, the Magna Carta. Actions to collect civil penalties or fines, called amercements, were required by the Magna Carta to be tried by a jury. Civil penalty actions were tried in England with a jury at the time of enactment of the Seventh Amendment. *Calfraft* v. *Gibbs*, (5 Term Rep. 19) (1792). In 1776, prior to enactment of the Seventh Amendment, suits to impose civil penalties were held by the courts of England to be civil actions, indistinguishable from an action for money had and received, and therefore actions at common law, subject to the right of trial by jury. *Atcheson* v. *Everitt* (1 Cowper, 382, 391).

Although this court has never explicitly held that a suit initiated by the government to impose civil penalties requires a trial by jury upon demand under the Seventh Amendment, it should be by implication settled law, as this has been the practice in our country since adoption of the Seventh Amendment. We note petitioner's list of at least fourteen reported cases which have previously been decided by this and other courts involving civil penalties sought by the government which were tried by a jury. Most of these cases determined issues relating to procedural matters alleged to violate the jury trial right under the Seventh Amendment, i.e., whether criminal or civil, granting a directed verdict, granting a new trial, right to appeal, burden of proof and taking the case from the jury when the evidence was not disputed. Significantly, no case held, or even inferred, that the

jury trial right did not exist. To the contrary, in every case, it was presumed to exist and constituted the very foundation upon which the Court's decision in the case was made.

It would be an incredible jurisprudential oversight if for over two hundred years the right to a jury trial under the Seventh Amendment did not exist in civil penalty cases when, without it, the holding of this Court in each civil penalty case would have been moot and no mention of this possibility was ever made in the reported cases.

B. THE COURT OF APPEALS ERRONEOUSLY CHARACTERIZED A CIVIL PENALTY AS AN EQUITABLE RATHER THAN LEGAL REMEDY.

To the extent that the majority of the court below analogized the civil penalty imposed in this case to "traditional equitable relief" or a "package" of remedies permitting the jury trial to be circumvented (Pet. App. p. 9a-10a) it is clearly wrong. No authority can be found that the imposition of a civil penalty in the amount of $325,000.00 is equitable relief.[4] To the contrary, prior decisions of this Court and other courts leave little doubt that civil penalties are not equitable relief but are legal relief.[5]

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[4] The failure to cite authority for this proposition in the opinion of the majority of the Court below is significant. (Pet. App. 10a) We believe that no authority is cited because it simply does not exist. Perhaps the majority below mistakenly believed that the District Court was providing restitution. However, restitution is not the same as a civil penalty. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946).

[5] *Hepner* v. *United States*, 213 U.S. 103 (1909) (dictum); *United States* v. *Regan*, 232 U.S. 37 (1914) (dictum); *Porter* v. *Warner Holding Co., supra* (dictum); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n, supra* (dictum); *United States* v. *J. B. Williams Co., supra; Connolly* v. *United States*, 149 F.2d 666 (9th Cir. 1945); J. Moore, J. Lucas and J. Wiches, Moore's Federal Practice paragraph 38.31[1] (2d ed. 1985), pp. 38-235, -236.

Even the District Court recognized that it was sitting both in equity and law (Pet. App. p. 59a). A civil penalty of such a substantial amount is most closely analogous to punitive damages in a civil case. This Court in *Curtis* v. *Loether*, 415 U.S. at 195, required a jury trial when punitive damages were awarded.[6] The District Court in this case made it clear that it intended the civil penalty to be punitive. (Pet. App. p. 61a)

Historically, courts of equity had jurisdiction only to address those cases for which no legal cause of action was available. This Court has held that the equity jurisdiction of the federal courts is limited to those equitable causes of action existing when the Constitution was enacted. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). However, the Seventh Amendment applies to actions unknown at the time that the Amendment was adopted and applies to new legal rights and legal remedies created if they are in the nature of actions triable under the common law, i.e., in contradistinction to equitable rights. *Curtis* v. *Loether*, 415 U.S. at 193. Accordingly, it is actions in equity which are limited at the time of the Amendment, and not common law actions. The majority opinion failed to appreciate this distinction and properly recognize that at civil penalty is a legal rather than an equitable remedy. (Pet. App. p. 8a)

To the extent that the majority of the court below would deny a jury trial because the civil penalty provision "intertwines with the imposition of traditional equitable relief," the majority is simply wrong. The statute itself in 33 U.S.C. Section 1319(b) makes a specific distinction between the equitable relief permitted and the civil penalty provisions found in 33 U.S.C. Section 1319 (d). Nothing in the legislative history supports a hold-

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[6] "As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." *Curtis* v. *Loether*, 415 U.S. at 195-196.

ing that the civil penalty provisions found in the statute are to be construed as "traditional equitable relief," nor is there any legislative history that would imply that a jury trial is to be denied when the government seeks civil penalties under the Clean Water Act. Absent any such clear direction from Congress, the courts are required to analogize the new legal duty and remedy sought to those "typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. at 195. This Court has by clear implication left no doubt that civil penalties are not equitable in nature, are readily distinguishable from restitution, and therefore require a trial by jury. *Porter* v. *Warner Holding Co.*, 328 U.S. at 402. To the extent that the decision of the majority of the court below may be read to deny a jury trial when equitable and legal relief in the form of civil penalties are mixed, it would be diametrically opposed to this Court's prior decisions.[7]

C. THE DECISION OF THE COURT OF APPEALS REPRESENTS A SUBSTANTIAL AND DANGEROUS RETRACTION OF THE RIGHT TO TRIAL BY JURY IN AMERICA.

We note with concern petitioner's analysis of the proliferation of recently enacted federal statutes which provide for the imposition of civil penalties in the federal courts (Pet. App. p. 82a-100a). Even without such a substantial increase in the number of statutes providing for civil penalties, the sheer magnitude of the penalty imposed in this case is, we believe, sufficient to invoke the Seventh Amendment's protection. As pointed out by Judge Warriner in his dissent, "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation". (Pet. App. p.

[7] *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Ross* v. *Bernhard*, 396 U.S. 531 (1970).

25a) It is reasonable to assume that if petitioner could choose between a civil penalty of $325,000.00 or six months and one day in jail, his choice would be jail. Each day in jail would be worth $1,795.58. No one would seriously argue that the Sixth Amendment would not entitle petitioner to a jury trial if he were imprisoned for more than six months for the violation. *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974). Is it not then an incredible argument that he can be denied a jury trial when the imposition of a civil penalty could ruin him financially for the rest of his life but could not be denied trial by jury if his punishment were to spend six months and one day in jail?

In the instant case petitioner found himself at odds with the overwhelming power of a government that sought "civil penalties" that could have totalled more than 22 million dollars (Pet. 6, note 8). What real difference would it have made to the petitioner if the government had sought a fine under the criminal penalties provided for in the statute, 33 U.S.C. Section 1319(c), which could have made him liable for the payment of 55 million dollars? Given the ability to obtain civil penalties of such astronomical amounts, the enforcement efforts of the government will surely be limited to the collection of a civil penalty.

By opting for the civil penalty provisions of a statute, the government avoids the more onerous requirements which are encountered in a criminal prosecution with its obvious Sixth Amendment requirement for a jury trial. When the Fifth Amendment no longer applies, the government can, with the use of pre-trial discovery, require the defendant to produce documents and testify against himself in the civil case. The government no longer must concern itself with the presumption of innocence. Its case is measured by the less difficult preponderance of evidence standard rather than proof beyond a reasonable doubt. If the defendant's last protection, trial by jury, is eliminated, the technical distinction between a civil suit to

enforce a substantial civil penalty and a criminal prosetion will be of little importance to the defendant. The defendant would, in fact, be better off if he were prosecuted criminally. A criminal prosecution would provide him with more constitutional protection and if the government prevails and destroys him financially, at least he will be provided food and shelter while he is imprisoned. The need for the Seventh Amendment's protection is known to all trial lawyers, and candidly admitted by one of this Court's former brethren.[8]

Amici curiae believes that its unwavering commitment to the Seventh Amendment's right to trial by jury has substantial historical support. Nearly 200 years ago while extricating themselves from an oppressive government and forming a new government, our forefathers found the right of trial by jury in civil cases so important that they refused to ratify the Constitution until the Seventh Amendment was included.[9] Insistence upon inclusion of the Seventh Amendment was the culmination of a consistent belief in its necessity, and its deprivation by the tyrant is found in the Declaration of Independence.[10] Its inclusion in a document originally drafted by a Virginia planter-lawyer and signed by 56 leaders of the time, 24 of whom were lawyers and 2 of whom were judges, dispels the notion that it was insignificant

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[8] "In our own times, the jury often has served as a deterrent to ambitious officials who wish to crush before them those who stand in their way. From where I sit reviewing some 3,500 cases a year, I often see the arbitrariness of a judge sitting as the thirteenth juror. One can easily imagine the extent of his severity when he sits alone." The American Jury: A Justification, Tom C. Clark, Associate Justice, Supreme Court of the United States, 1 Vol. L. Rev. 1, 4-5 (1966).

[9] "The objection to the plan of the convention, which has met with most success in this state is relative to *the want of a constitutional provision for the trial by jury in civil cases.*" *The Federalist on the New Constitution*, Hamilton, Madison and May, written in the year 1788, Hallowell 1831, p. 411 (emphasis supplied).

[10] ". . . For depriving us, in many cases, of the benefits of Trial by jury:" Declaration of Independence.

and unnecessary. Petitioner and those similarly situated find themselves no less in need of the Seventh Amendment's protection than their forefathers.

CONCLUSION

For these reasons and those stated in the Brief of the Petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

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Pennsylvania Trial Lawyers
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Western Trial Lawyers
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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals below erred in holding that petitioner was not entitled under the Seventh Amendment to a trial by jury in federal district court in a government-instituted civil action for the recovery of substantial civil penalties under a federal statute.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1259

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of cases dealing with the constitutional rights of businesses and individuals. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric Company v. The Public Utilities Commission of the State of California*, 106 S. Ct. 903 (1986).

WLF believes that the issue involved in this case, *i.e.*, the right to a jury trial where the government is seeking civil penalties, is of utmost importance to citizens, businesses, and unions who are subjected to increasing government regulation and are thus exposed to liabilities that risk their very financial survival. Accordingly, WLF believes it is in the public interest that the important constitutional right to a jury trial be preserved in these circumstances.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF adopts by reference the Statement of the Case as presented by the petitioner in his brief.

SUMMARY OF THE ARGUMENT

A civil suit in federal court seeking civil penalties is an action at law entitling the parties to a jury trial under the Seventh Amendment of the Constitution. Numerous case authority by this Court and lower federal courts have consistently protected this fundamental right to litigants. Accordingly, the majority opinion of the court below erroneously construed these precedents, and erred by ruling that a claim for equitable relief along with a legal claim for civil penalties in the same suit extinguishes the right to a jury trial.

WLF submits that this Court should preserve this fundamental constitutional right to a jury trial, especially where, as here, the full weight of the United States as a plaintiff is being brought to bear against a single citizen. In this way, a jury will be able to temper the overzealousness of government enforcers and the awesome power of federal courts with some measure of restraint.

ARGUMENT

I. PETITIONER WAS ENTITLED TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT BECAUSE THE GOVERNMENT'S SUIT FOR CIVIL PENALTIES INVOLVED ISSUES THAT WERE LEGAL IN NATURE.

The Seventh Amendment to the United States Constitution guarantees the right to a trial by jury in "suits at common law." U.S. Const. Amend. VII. This phrase originally referred to those actions triable in an English court of law, as opposed to a court of equity, when the Amendment was adopted in 1791. An action brought in an English court of law, usually seeking a money judgment, entailed the right to a jury trial, whereas an action in an equity court was tried before the judge. The distinction between legal and equitable issues has evolved throughout U.S. history and, with it, the right to a trial by jury.

A. Petitioner Was Entitled To A Jury Trial Under The Seventh Amendment Because The Government's Suit Was Analogous To A Common-Law Action For Debt.

It is unnecessary to recount here the complete evolution of law and equity, with its origins in the English common law. It will suffice to note that this Court regards the protection granted by the Seventh Amendment as extending not only to those claims which were recognized at common law in 1791, but also to new causes of

action, created by statute, which are *analogous* to common-law actions. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). *See also Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) (holding that the Seventh Amendment "may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights").

In the instant case, the government claimed that petitioner Tull violated both the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* The total amount of civil penalties imposed on Tull could have been as high as $22,890,000. The federal district court below denied Tull's timely request for a jury trial and ultimately required Tull to pay a $325,000 judgment to the government.

Under settled Seventh Amendment doctrine, this suit for civil penalties by the government was in the nature of an action for debt at common law and was therefore subject to the requirements of the Seventh Amendment. *See, e.g., Hepner v. United States*, 213 U.S. 103 (1909) (stressing, in a government suit for civil penalties under a federal immigration statute, that "whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt") and *United States v. Regan*, 232 U.S. 37 (1914) (plainly stating in the first sentence of the opinion that this suit to collect civil penalties for violation of another immigration statute "was an action of debt prosecuted by the United States"). In *Tull*, the government's recovery of $325,000 in civil penalties under the Clean Water Act renders this case clearly analogous to a common law action for debt. Therefore the denial of Tull's demand for a jury trial contravened his Seventh Amendment rights.

B. Although All Of The Issues In The Government's Action Are Effectively Legal In Nature, The Seventh Amendment Would Apply Even If Some Equitable Issues Were Also Involved.

The appellate court's characterization of the judgment against Tull as a "package" of remedies within the "statutorily conferred equitable power" of the court, *United States v. Tull*, 769 F.2d 182, 187 (4th Cir. 1985), is a distortion of both fact and law.

As to the factual distortion, the variation in the judgment, which presumably converted Tull's civil penalties into a "package" in the view of the court, was the trial court's offer of an "option." Tull could opt to exchange $250,000 worth of his judgment liability for the task of restoring a large ditch he had filled to its original condition. 769 F.2d at 185. As the trial judge knew at the time of the offer, for Tull, this was no viable option. Third parties had already purchased the lots which Tull would be required to restore in order to exercise his "option." In other words, there was no "equitable" aspect to the fines imposed on Tull. His penalties were purely legal in nature.

Regarding the court's distortion of the law, it was error to deny a requested jury trial in a case where, by the court's own description, "the assessment of penalties intertwines with the imposition of traditional equitable relief," *Tull*, 769 F.2d at 187. Assessment of civil penalties is clearly a legal issue, and the court's refusal to grant a jury trial for this issue represents a return to the equitable "cleanup doctrine," which permitted a court in a nonjury equity trial to retain jurisdiction over even the legal issues involved. This doctrine, however, was repudiated by the Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The Court there held that, in an action involving factual questions common to both legal and equitable issues, the trial judge must try the legal issues *first* in order to safeguard the Seventh

Amendment right to a jury trial. The jury's findings of fact would then be binding throughout the entire case—including resolution of equitable issues. Only "under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate," *id.* at 510-11, should the equitable issues be tried first. *Beacon Theatres* was thus a milestone case, representing the expansion of the Seventh Amendment's applicability and the corresponding curtailment of the scope of equity.

The Court further reinforced the principles of *Beacon Theatres* in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), holding that, in an action seeking both legal and equitable relief, the Seventh Amendment guaranteed a jury trial as to the legal issues. This guarantee applies "whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." *Id.* at 473. *See also Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961) (urging that "it would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable," because of the overriding power of the Seventh Amendment).

Ross v. Bernhard, 396 U.S. 531 (1970), continued the Court's augmentation of the Seventh Amendment's scope. In *Ross*, the Court held that the traditional view of stockholder derivative actions as equitable in nature did not preclude applicability of the Seventh Amendment. The constitutional jury trial right applied because the same action brought by the corporation itself (rather than by shareholders) would have been legal in nature. Even though *Ross* requires the judge to make the initial determination of whether the corporate claim presents a legal issue, the jury trial right nonetheless applies if such an issue exists.

Judge Friendly conducted a rigorous analysis of the Seventh Amendment right to a jury trial in *United*

States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974). In *J.B. Williams*, the government sought civil penalties for alleged violations of a cease and desist order issued under the Federal Trade Commission Act, 15 U.S.C. § 40 *et seq.* The court held that, even though a federal statute is silent on the jury trial right, the Seventh Amendment demands that a jury trial be granted in a suit by the government for civil penalties under the statute. Judge Friendly flatly stated that "[t]here can be no doubt" about this right. *J.B. Williams*, 498 F.2d at 422.

Ignoring this formidable background of case law on the Seventh Amendment, the majority opinion in *Tull* relies principally on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Such reliance, however, is misplaced. In *Atlas Roofing*, the Court created a narrow "public rights" exception to the Seventh Amendment, "—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact [and where] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Atlas Roofing*, 430 U.S. at 450 (footnote omitted). Significantly, there is no "administrative forum" created by Congress with respect to the adjudication of issues presented in the instant case.

Amicus also submits that the legal or civil penalty aspects of the case in *Atlas* were not properly addressed by the Court. The petitioners in *Atlas* sought review in this Court of the court of appeals' decision as to whether they were entitled to a jury trial *at the administrative level*. However, the Secretary of Labor *never* sought enforcement of the civil penalties *in a federal district court* where the right to a jury trial would attach. In describing the statutory procedures involved in the *Atlas* case, this Court observed: "If the employer fails to pay the

assessed penalty, the Secretary of Labor may commence *a collection action* in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried, § 666(k)." 430 U.S. at 443 (emphasis added). It is *amicus*' position that any such "collection action" is a legal remedy in the nature of a debt at common law and thus would entitle the defendant to a jury trial. Further, 29 U.S.C. § 666(k) does not on its face preclude retrying the "fact" of the violation and "propriety" of the civil penalty. Thus, while the instant case is clearly distinguishable from *Atlas*, we submit that the legal posture of the case in *Atlas* prevented a focused analysis of the applicability of the Seventh Amendment.

Finally, *amicus* wishes to note that the record does not show that the petitioner violated any "public right" *per se* that could be found in the Clean Water Act or Rivers and Harbors Act. Rather, petitioner was fined solely for failing to get official permission to do what he did, namely, to fill in certain wetlands. Thus, this case is unlike that presented in *Atlas* whereby Congress sought to protect workers by prohibiting certain unsafe work conditions. The Occupational Safety and Health Act of 1970 does not give regulators the power to give official permission to an employer to violate the substantive requirements of OSHA.

In any event, the Court in *Atlas Roofing* did not abandon its long-standing formulation of suits "at common law" as including those which are analogous to traditionally legal causes of action. 430 U.S. at 460. The presence of legal issues in *Tull* is undeniable. The government sought monetary penalties, and Tull denied the government's factual allegations that form the necessary predicate for the imposition of penalties. *United States v. Tull*, 615 F. Supp. 610, 612 (E.D.Va. 1983). The Seventh Amendment to the Constitution thus entitled Tull to a jury trial.

II. CONGRESS IMPLICITLY PRESERVED THE RIGHT TO A JURY TRIAL IN THE CLEAN WATER ACT AND THE RIVERS AND HARBORS ACT BY FAILING TO NEGATE THE RIGHT EXPRESSLY.

When interpreting statutes that are silent on the right to a jury trial, federal courts often hold that Congress' failure to provide expressly for nonjury trial implies that the right to a jury trial remains. For example, the Federal Employee's Liability Act, 45 U.S.C. § 51 *et seq.*, is silent on the jury trial issue. However, this Court has held that when a party sues under this statute, the right to a jury trial is "part and parcel of the remedy." *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 354 (1943). Thus, even though a jury trial is not required by the Seventh Amendment in a federal statutory action, the jury trial right is so fundamental to our system of civil jurisprudence that it cannot be denied unless expressly negated. The Court adhered to this view again in *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952). *See also Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974).

Thus, while Congress may have the power to exempt a statute from the scope of the Seventh Amendment by providing for enforcement in a special court or administrative proceeding, each of the statutes under which Tull was prosecuted fails to provide for any such special procedures. Further, neither the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, nor the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*, denies a party the right to a jury trial.[1] The legislative history of these statutes does not

[1] Even when a statute's history does indicate that Congress may have preferred nonjury trial, there is a presumption in favor of the jury trial right. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court heard arguments that Congress intended nonjury trials for actions under the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* The Court responded to this evidence by holding that legal actions brought under federal statutes entail the right to a jury trial, unless there is a "functional justification for denying the jury trial right." *Curtis*, 415 U.S. at 195.

demonstrate that such a denial was intended. Thus, a right to a jury trial must be found intact.

In the instant case, there was no functional justification for the denial of a jury trial. Because Congress did not expressly negate the jury trial right in either the Clean Water Act or the Rivers and Harbors Act, Tull's request for a jury trial should have been granted.

III. THE PUBLIC INTEREST IS SERVED BY PRESERVING THE RIGHT TO A JURY TRIAL.

The distinction between the administrative forum provided by Congress in *Atlas Roofing* and the absence of such forum in this case is significant. As this Court said in *Atlas Roofing*, "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." 430 U.S. at 456. In this case, Congress did not establish an administrative forum to adjudicate this matter, but expressly provided *de novo* review in federal district courts. While *amicus* recognizes that court dockets are crowded, the Congress nevertheless directed that these cases be heard in federal courts. Consequently, a right to a jury trial for civil penalties would be totally compatible with the intent of Congress involving, at best, only a slight increase in the expenditure of judicial resources.

This Court should resist any notion that a reversal of the court below would further crowd courts' dockets. While, no doubt, a court sitting without a jury is a more convenient mechanism, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 945 (1983); *Bowsher v. Synar*, —— U.S. ——, 55 U.S.L.W. 5064 (July 7, 1986).

As Justice Rehnquist stated:

> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 347 (1979) (Rehnquist, J., dissenting). Although *Parklane* involved a suit by private litigants, the right to a jury trial is equally if not more important where the government is the plaintiff. For as Justice Rehnquist further observed, "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." 439 U.S. at 344 (Rehnquist, J., dissenting).

In any event, in cases brought by the government, many factual issues have been disposed of by full or partial summary judgment without the necessity of a jury. Thus, a preservation of the right to a jury trial would not unduly prolong the disposition of cases of this type.

CONCLUSION

For all the foregoing reasons, *amicus* submits that the decision below should be reversed.

Respectfully submitted,

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Dated: August 11, 1986

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INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association (hereafter "WSTLA") is a voluntary non-profit membership organization dedicated to the advancement of the legal profession and protection of the legal rights of citizens of the State of Washington. The organization and its membership have a significant interest in preservation of the constitutional right to trial by jury in civil actions. The decision of the Court in this case will likely resolve present uncertainties with regard to entitlement to a jury trial in civil penalty cases prosecuted by the government. It will necessarily have a substantial impact on clients represented by WSTLA's membership. Both Petitioner Tull and Respondent United States have

consented to WSTLA's appearance as amicus curiae and proof thereof will appear in the Clerk's file.

II

QUESTION PRESENTED

Whether the Seventh Amendment to the United States Constitution entitles a citizen to a trial by jury in a civil action commenced by the government in federal district court seeking civil penalties under federal law?

III

SUMMARY OF ARGUMENT

Under English common law prior to 1791 a civil jury trial was available for actions involving governmental claims for penalties and forfeitures. Further, events surrounding the Revolution,

adoption of the Constitution, and enactment of the Seventh Amendment should be considered as relevant by the Court in resolving the question presented. Such events unmistakably demonstrate the Seventh Amendment was designed to protect the citizenry in cases exactly like this one.

IV

ARGUMENT OF AMICUS CURIAE WSTLA

The right to a jury in a civil or criminal context has been a basic concern of the people throughout the history of this country. The deprivation of jury trials by the Crown was specifically mentioned as a grievance in the Declaration of Independence. Thomas Jefferson wrote of the right to trial by jury that,

> I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.

3 Writings of Thomas Jefferson (Washington ed.) 71. The absence of a specific guarantee to right of trial by jury in civil cases threatened ratification of the United States Constitution. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 638, 657, 669 (1973) [hereafter "Wolfram"]. One of the first acts of Congress after ratification of the Constitution was promulgation of the Seventh Amendment as part of the Bill of Rights. Wolfram, at 672-673.

Since its enactment, this Court has continuously recognized the profound importance of the right to jury trial protected by this Amendment.

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, at 752-53 (1941).

As a statement of fundamental principles, the Seventh Amendment simply provides "[i]n Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved . . . ". Questions regarding interpretation and application of the Seventh Amendment have been resolved by evaluating the phrase, "[s]uits at common law," by reference to the common law of England as it existed prior to 1791. Curtis v. Loether, 415 U.S. 189,

193 (1974). However, this Court has not limited this right to jury trial solely to common law actions recognized at that time, but taken into account other relevant factors such as subsequent developments in expansion of remedies and modifications in civil procedure. Curtis at 266; Ross v. Bernhardt, 396 U.S. 531, 538 (1970) (applicability depends on "nature of issue tried rather than the character of the overall action"); Wolfram at 738. The primary focus, however, remains on whether historically the type of action involved, or its antecedent, was cognizable in the ordinary courts of law, as opposed to the equity and admiralty courts. Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442,

449 (1977); Parsons v. Bedford, 3 Pet. 433, 7 L.Ed. 732 (1830).[1]

Applying the historical approach to the circumstances involved here requires upholding the right to a jury trial in cases by the government seeking civil penalties. The right to jury trial in penalty cases in England existed during Colonial days.[2] To the extent that the Colonies did not similarly share the right to jury trial in penalty cases,

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[1]The common law as applied by the individual Colonies has not been used as a source for determining the common law as of 1791 due to variances in jury trial practices. Wolfram at 711.

[2]Petitioner's brief on the merits, a draft of which was reviewed by Amicus Curiae WSTLA, surveys English and American common law demonstrating the historical treatment of suits for enforcement of civil penalties as common law actions. These authorities are not repeated here. However, as noted in the main text, in the Colonies England made repeated efforts to wrest from the Colonists the right to trial by jury. See, Goebel, post, p. 6.

this was in some instances due to heavy-handed legislating by the Crown designed to specifically deny the Colonists this right.[3] In his work tracing the development of the Constitution and courts through 1801, Professor Julius Goebel, Jr., relates that in the mid-18th century the Colonists were subjected to trade legislation designed to foreclose access to civil jury trials involving penalties and forfeitures. See, J. Goebel, Jr., I History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, pp. 83-95 (Macmillan, 1971)

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[3]There was generally a strong tradition of civil jury trial in the Colonies prior to the Constitutional Convention. Wolfram at 656. This tradition is traceable to the common law of England, witnessed by Blackstone's characterization of civil jury trial as "the glory of English law." Id. at 654, fn. 45.

[hereafter "Goebel"].[4] As related by Professor Goebel, during this period English law provided for enforcement of trade laws in the realm in its common law courts while, as to enforcement in the Colonies, permitting the informer to elect between the common law courts and vice-admiralty courts. Goebel at 86-87.[5] Professor Goebel recounts these events as representing a significant shift in the Colonial constitutional approach by England:

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[4]This volume is one of eleven relating the history of the Supreme Court of the United States funded by a bequest by Oliver Wendell Holmes, Jr., which resulted in an act of Congress establishing the Oliver Wendell Holmes Devise Fund.

[5]In the early common law an "informer" was anyone who was enfranchised by statute to pursue recovery of penalties on behalf of the government. Some statutes permitted the informer to retain a portion of the penalty recovered. See generally, Marvin v. Trout, 199 U.S. 212, 225-26 (1905).

> If one can speak of a Colonial constitutional approach in the first half of the 18th century general to all Colonies and divorced from the acerbities produced by single crises, it was the philosophy of the modus vivendi--nurtured by the long period of 'salutory neglect' begun under Sir Robert W. Walpole. This philosophy had been imperilled by measures taken during the French and Indian War. It was shattered after 1763 by changes in English fiscal policy, and the concurrent alteration of the methods of enforcing trade laws.
>
> The initial gambit in the new English policy was a statute (1763) seeking to tighten enforcement by extending to the plantations an earlier hovering act, and authorizing use of the Royal Navy to prevent smuggling, thus diverting these ships, as a New York merchant complained, into 'floating Custom Houses.' In the Colonies, penalties and forfeitures were committed at the option of the informer to courts of admiralty or to courts of record; in the realm common law courts. This was the first of a series of statutes that was to raise the question of deprivation of jury.

Goebel at 85 (footnotes omitted).

These events provide insight as to why the Colonists had such concern about the right to jury trial and why, later, the Antifederalists would be so insistent upon assurances in our Constitution preserving this right. Goebel at 319; Wolfram at 672. In commenting upon the effect these maneuverings, viz. England's channeling of revenue penalty and forfeiture cases into Colonial vice-admiralty courts, had on Colonial attitudes toward the right to trial by jury, Professor Goebel concludes:

> The Americans could not but regard this act as an assault upon the right to jury trial. Their attachment to this form of trial was then neither irrational nor a species of romantic illusion. In the harsh criminal procedure of the day it was only the jury that could dispense the leaven of mercy, and in civil proceedings it functioned as an immediate corrective for the lack-learned or overbearing judge. Insofar as the Colonists

> had in their several jurisdictions settled their own constitutional standards, jury trial and by men of the vicinage was high among these, a palladium against officialdom. To subtract this protection, to the end that collection would be assured of revenues imposed without consent, amounted in Colonial eyes to the employment of an unconstitutional means to effect an unconstitutional end.

Goebel at pp. 86-87.

The strong Colonial bent toward protection of the right to trial by jury, both criminal and civil, was carried forward by the Antifederalists. Goebel at 319. Indeed, Wolfram notes that only with regard to the issue of civil jury trials did the Antifederalists prevail. Wolfram at 672. The Constitutional Convention had been absorbed with the structure of the new government and formulating a "document of first principles." While there was some discussion

of a Bill of Rights toward the end of the Convention, including entitlement to civil jury trial, it was thought better to leave the matter to the new Congress. Id. at 666. The omission of civil jury trial from the Constitution became a dominant objection by Antifederalists such as George Mason of Virginia. The issue was of such moment that Alexander Hamilton devoted an entire Federalist paper to examination of trial by jury in civil cases. The Federalist No. 83 (J. Cooke ed. 1961). Professor Wolfram notes:

> The fact remains that the ratification process brought to light strongly felt popular beliefs about government and its relationship to the person in the street and the importance of the civil jury in preserving that relationship.

Id. at 669.

* * *

> In the end, the defenders of the proposed Constitution were reduced almost entirely to defending the omission of a guarantee of jury trial as a problem of technical draftsmanship. The Federalists repeatedly promised that this would be disposed of by appropriate legislation as one of the first items of business of the new Congress. This assurance was asserted amidst a chorus of Federalist disclaimers of any intent to limit jury trial in civil cases in the proposed federal courts.

Id. at 666 (fn. omitted). Because of the role the Antifederalists played in the enactment of the Seventh Amendment their views should be "acutely relevant to a determination of the intended reach of the amendment." Wolfram at 669, fn. omitted.[6] Professor Wolfram synopsizes

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[6]The suggestion that the views of the Antifederalists, and the reaction to them culminating in the Bill of Rights and the Seventh Amendment, is worthy of special note mirrors Justice Rehnquist's observations in his dissent in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), where he noted " . . . the decision of this case

the underlying reasons for Antifederalist insistence on civil jury trials as follows:

> Surviving materials demonstrate that the antifederalists advanced several distinct and specific arguments in favor of jury trial: the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and protective judges.

Id. at 670-71.

The abhored suits at vice-admiralty for forfeitures and penalties which motivated the Antifederalists to insist on a bill of rights to guarantee the

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turns on the scope and effect of the Seventh Amendment, which, perhaps more than any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." 439 U.S. at 339-340 (Rehnquist, J., dissenting).

right to trial by jury is the practical historical equivalent of the present day suit for civil penalties brought against Tull. Amicus submits the proponents of the Seventh Amendment would be dumbfounded to see the hated non-jury vice-admiralty procedure rear its head again despite the enactment of the Seventh Amendment to put it to rest.

The concern of the Colonists and Antifederalists, and the first Congress which assuaged anxieties in the new nation by enacting the Seventh Amendment, cannot be overlooked in this suit by the government against a citizen. Wolfram at 673. This type of litigation was one of the very reasons for the Seventh Amendment. This Court should recognize the significance of the historical events in the Colonies giving rise to the Seventh

Amendment and uphold the right of a citizen to a trial by jury in civil penalty cases prosecuted by the government.

V

CONCLUSION

Amicus curiae WSTLA respectfully submits this Court should uphold petitioner Tull's right to jury trial, as guaranteed by the Seventh Amendment to the United States Constitution.

Respectfully submitted this 15 day of August, 1986.

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